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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

RUTH HABERERN,

Petitioner,

— *v.* —

KAUPP VASCULAR SURGEONS, LTD. DEFINED BENEFIT PENSION PLAN AND TRUST AGREEMENT, LEHIGH VALLEY VASCULAR SURGEONS, LTD. RETIREMENT PLAN, LEHIGH VALLEY VASCULAR SURGEONS, LTD. and KENNETH M. McDONALD, TRUSTEE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Do fiduciary obligations attach within the meaning of ERISA § 3 (21)(A), 29 U.S.C. § 1002 (21)(A), when an employer, who also serves as a pension plan administrator, sponsor, and trustee, fraudulently induces an employee to participate in the pension plan and misleads the employee as to the plan's terms?

2. Does ERISA § 510 permit discriminatory pension plan amendments?

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Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 151 F.R.D. 49 (E.D. Pa. 1993) is reproduced in the Appendix, *infra* at pp. 74a-78a.

Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 822 F. Supp. 247 (E.D. Pa. 1993) is reproduced in the Appendix, *infra* at pp. 39a-73a.

Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan and Trust Agreement, 812 F. Supp. 1376 (E.D. Pa. 1992) is reproduced in the Appendix, *infra* at pp. 79a-92a.

JURISDICTION

Petitioner Ruth Haberern seeks review from a final judgment entered on May 25, 1994. On June 25, 1994, the United States Court of Appeals for the Third Circuit denied Mrs. Haberern's Petition for Rehearing. On September 22, 1994, Justice Souter signed an order extending the time within which to file a petition for a writ of certiorari to and including November 17, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED IN THE CASE

The pertinent text of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001, 1002, 1022, 1104, 1105, 1132, 1140 and 1144 is contained in the Appendix accompanying this Petition.

STATEMENT OF THE CASE

This case squarely presents the question whether ERISA's protections may be eviscerated in the name of employer sovereignty over at-will employees.

A. Nature of the Case

Ruth Haberern initiated this lawsuit against (a) two employee pension plans, (b) her employer who established, sponsored, and administered the plans, and (c) the plans' trustee to recover pension benefits and salary that were wrongfully withheld under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. After a three-day bench trial, the United States District Court for the Eastern District of Pennsylvania determined that Mrs. Haberern's rights under ERISA and the pension plans had been violated because the defendant pension fiduciaries (1) collectively misled Mrs. Haberern by informing her that participation in one of the pension plans was mandatory when in fact it was voluntary, thereby forcing her to participate in the plan against her will; (2) forced her to fund the plan when the plan document required the employer to fund the plan; (3) affirmatively misled Mrs. Haberern when they told her that she would receive a pension benefit equal to her salary when she retired; and (4) removed critical pages from the copy of the Summary Plan Description provided to Mrs. Haberern that would have disclosed her employer's contribution obligations and the voluntary nature of the plan. (App. 56a-57a). The District Court also determined that Mrs. Haberern's employer discriminatorily amended one of the plans by tripling the value of all other participants' life insurance benefits while totally eliminating Mrs. Haberern's because she was the only employee over 56. (App. 59a-60a).

Despite the uncontradicted record of fraud, trickery, and deceit related to Mrs. Haberern's pension, the United States Court of Appeals for the Third Circuit, relying on Pennsylvania's at-will employment doctrine, reversed the District Court's decision and held that ERISA offered no protection to Mrs. Haberern. (App. 8a-16a). The Court of Appeals also reversed the District Court's decision regarding

the discriminatory pension plan amendment by adopting the position that while ERISA prohibits discrimination interfering with pension rights, it does not prohibit discriminatory plan amendments. (App. 22a-26a).

B. Statement of Facts

1. Mrs. Haberern Begins Working for Lehigh Valley.

Ruth Haberern is a 72-year-old woman who, from 1974 to 1985, worked as a secretary-bookkeeper for a medical practice, Lehigh Valley Vascular Surgeons, Ltd. ("Lehigh Valley").[1] (App. 41a, 61a n.1).

To attract Mrs. Haberern to work for Lehigh Valley in 1974, Dr. Harry A. Kaupp, M.D., Lehigh Valley's sole shareholder, director, and officer at the time, offered Mrs. Haberern an annual salary of $11,500. (App. 41a). As an incentive, Kaupp offered to pay Mrs. Haberern, as part of her compensation, a percentage of the corporation's gross receipts, payable in an annual lump sum. (App. 41a). The more Lehigh Valley's gross receipts increased, so too would this part of Mrs. Haberern's salary. Mrs. Haberern's salary increased every year from 1975 to 1979. (App. 41a).

2. Lehigh Valley Establishes the Defined Contribution Pension Plan.

As an additional benefit, Lehigh Valley established a defined contribution pension plan, the Lehigh Valley Vascular Surgeons Ltd. Retirement Plan ("Defined Contribution Plan"[2]). Under the Defined Contribution Plan, Lehigh Valley made contributions to the plan each year on behalf of each participant. Mrs. Haberern participated in the plan from its effective date. (App. 42a).

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1. In 1984, the corporate name of Kaupp Vascular Surgeons, Ltd., which had been incorporated in 1973, was changed to Lehigh Valley Vascular Surgeons, Ltd. Throughout this Petition, Mrs. Haberern's employer will be referred to as "Lehigh Valley."

2. The Defined Contribution Plan, originally known as Kaupp Vascular Surgeons Ltd., Employee Pension Plan changed its name to Lehigh Valley Vascular Surgeons, Ltd. Retirement Plan.

3. Enter Dr. McDonald, the "Trustee."

On May 1, 1978, Dr. Kenneth McDonald, who had joined Lehigh Valley in 1976, became a trustee of the Defined Contribution Plan. (App. 40a). Dr. McDonald and Dr. Kaupp were Lehigh Valley's only shareholders from 1973 through November 1, 1984. (Kaupp Dep. Tr. at App. 133a).

4. Kaupp and McDonald Decide To Create a Defined Benefit Pension Plan.

In 1979, Kaupp and McDonald decided they wanted to shelter more of their income from taxes and began the process of establishing a second pension plan, a defined benefit pension plan.[3] (Lisicky Test. at App. 127a).

In March 1980, McDonald and Kaupp, the two shareholders of Lehigh Valley, established the Kaupp Vascular Surgeons, Ltd. Defined Benefit Plan and Trust Agreement ("Defined Benefit Plan"). (App. 43a-45a).

Throughout the Defined Benefit Plan document, constant reference was made to employer contributions; the Defined Benefit Plan document did not refer to employees contributing to fund the Defined Benefit Plan. Accordingly, the District Court found as fact that the Defined Benefit Plan required the employer to make the contributions to fund the pension benefits. (App. 56a).

5. The Doctors' "Problem": Ruth Haberern.

One problem remained, however, regarding the Defined Benefit Plan: Ruth Haberern.

Mrs. Haberern's presence actually created two problems for the doctors. First, because she was an older employee, higher annual contributions would be needed to fund her pension benefit; but the

3. A defined benefit plan differs from a defined contribution plan in that a person's benefit is based upon a formula taking into account factors such as age, compensation, and years of service. Thus, the employer guarantees a certain benefit based on a formula and benefits are paid out of a fund under the plan.

doctors did not want to make the required contribution. Because Ruth Haberern was older — she was 57 years of age at the time, which meant that she had a relatively short time before retiring — Lehigh Valley would have to contribute approximately $10,000 annually into the Defined Benefit Plan on behalf of Mrs. Haberern. (App. 44a).

The other problem was that for the Defined Benefit Plan to go into effect under the law, the doctors needed Ruth Haberern to participate in the Plan. The doctors' solution to these two problems was simple: as the District Court found, they cheated and lied to Mrs. Haberern.

The strategy of the plan's trustees and Lehigh Valley (the plan sponsor and administrator) regarding Mrs. Haberern's pension was this:

1. Create a Defined Benefit Plan which provided that the employer would make the full contributions under the Plan. (App. 56a).

2. Mislead Mrs. Haberern by telling her that she was required to join the Defined Benefit Plan — when, in reality — participation in the Defined Benefit Plan was voluntary. (App. 56a).

3. Mislead Mrs. Haberern by assuring her that she would receive a pension benefit equal to her salary upon retirement. (App. 45a).

4. Reduce Mrs. Haberern's salary from about $19,000 to approximately $14,500. (App. 44a, 57a-58a).

5. Use the money taken from Mrs. Haberern's salary to make the contribution to the Defined Benefit Plan to fund her pension benefit. (App. 44a, 57a).

As a result of the doctors' scheme and continuing conduct, Lehigh Valley diverted a sizeable portion of Mrs. Haberern's salary to the De-

fined Benefit Plan — thus enabling Lehigh Valley to reduce its contribution to only $5,500, rather than the $10,000 the Defined Benefit Plan required on behalf of Mrs. Haberern. (App. 44a).

John Lisicky, Lehigh Valley's accountant, testified at the trial that Mrs. Haberern's salary was slashed specifically to accommodate the Defined Benefit Plan. Regarding the doctors' scheme, Mr. Lisicky stated:

> They [the doctors] told her [Mrs. Haberern] that they were going to reduce her compensation, her salary from the $19,000 down to the $14,000 and then the amount going to the Defined Benefit Plan for her would have been reduced from approximately 10,000 to approximately $5,500. In essence, she was taking her salary and funding her plan.

(App. 130a).

Mrs. Haberern also testified that, in August 1980, she was told specifically that her accounts receivable percentage would be diverted to pay into the Defined Benefit Plan. (App. 124a). Mrs. Haberern's testimony on this point was never challenged at the trial.

To ensure the success of the trustees' scheme, Lehigh Valley (the plan sponsor and administrator) never informed Mrs. Haberern that the Defined Benefit Plan required the employer to make the contributions to the Plan. (App. 45a; Haberern Test. at App. 125a). The summary plan description[4] given to Mrs. Haberern was missing critical pages regarding contributions to the plan, insurance, and the table of contents. (App. 45a, 56a). One of the missing pages stated: "No contributions are required on your behalf. Rather, the Employer makes the full required contribution under the Plan."

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4. ERISA requires that pension plan recipients receive summary plan descriptions summarizing the terms of the plan. 29 U.S.C. § 1022(a)(1).

In August 1980, when the doctors told Mrs. Haberern that her compensation was being slashed by almost 25% so that they could enact the Defined Benefit Plan, Mrs. Haberern expressed her unhappiness. (App. 45a). Despite Mrs. Haberern's protests, the plan's trustees continued to tell Mrs. Haberern that she was required to join the Defined Benefit Pension Plan — when, in reality — participation in the Defined Benefit Plan was voluntary. (Riley Test. at App. 131-132a).

The fact that the two doctors — who were the Plan's trustees and the sole shareholders in Lehigh Valley, the Plan Administrator and sponsor — affirmatively misled Mrs. Haberern, despite her protests, was never contradicted at trial. And although trustee McDonald testified for several hours in his defense, he did not mention, let alone contradict, the fact that he had affirmatively misled Mrs. Haberern into participating in the Defined Benefit Plan.

Accordingly, the District Court found that McDonald and Lehigh Valley "did not give [Mrs. Haberern] a choice with respect to participating in the Defined Benefit Plan and never informed her that the employer, not the employee, was required to make the contributions to the Plan." (App. 56a). The District Court also concluded that the Plan sponsor and administrator, Lehigh Valley, breached its fiduciary duties and violated the terms of the Plan by eliminating a portion of Mrs. Haberern's compensation and using it to fund the Defined Benefit Plan, thereby forcing her to fund the Plan. (App. 70a; Conclusion of Law ¶ 12).

6. The Doctors Discriminatorily Eliminate Her Life Insurance Benefit.

In 1980 Lehigh Valley cancelled a life insurance benefit under the Defined Benefit Plan for Mrs. Haberern while simultaneously tripling all other participants' life insurance benefits. (App. 46a). Mrs. Haberern never received any notification of the amendment concerning the life insurance, signed and approved by trustee McDonald. (App. 46a). Because the District Court found the employer's stated reason for this change, i.e., to save money, "unworthy of belief," (App. 60a), the court held that Lehigh Valley had the discriminatory intent of inter-

fering with Mrs. Haberern's benefits in violation of ERISA § 510, 29 U.S.C. § 1140, by discriminatorily amending the Defined Benefit Plan.

B. The Appellate Decision

1. The Court of Appeals Found the Fraudulent Inducement of Mrs. Haberern to Participate in the Pension Plan and the Diversion of Her Salary To Fund the Employer-Funded Plan Was "Managerial in Character" and Thus Completely Unrestricted by ERISA.

A panel of the United States Court of Appeals for the Third Circuit reversed the District Court's conclusion that the Pension Plan fiduciaries breached their fiduciary duty. The panel adopted the position that ERISA does not preempt an employer's rights under Pennsylvania's at-will employment doctrine and concluded that the fiduciaries' decision to fraudulently induce Mrs. Haberern to participate in the Defined Benefit Plan and to divert her salary to fund the employer-funded pension plan was "managerial in character" and thus unrestricted by ERISA. "The fact that this decision may not have been in Haberern's interest makes no difference. . . . [U]nder Pennsylvania law they had the right to decrease her compensation whether or not they had established a benefits plan. Therefore Haberern's only remedy if she had been unwilling to continue her employment for the compensation offered was to resign." (App. 16a).

2. Approval of the Discriminatory Pension Plan Amendment

Accepting the District Court's finding that Lehigh Valley had acted with discriminatory intent, the appellate panel nonetheless reversed the District Court's holding. The panel held that ERISA § 510 does not apply because, while ERISA prohibits discrimination interfering with plan rights, it does not prohibit discriminatory plan amendments. (App. 22a-26a).

BASIS FOR THE DISTRICT COURT'S JURISDICTION

The United States District Court for the Eastern District of Pennsylvania had jurisdiction over this matter pursuant to ERISA § 502(e)-(f), 29 U.S.C. § 1132(e)-(f).

ARGUMENT

The facts in this case are too typical: an older woman works as a secretary-bookkeeper for a small professional office — doctors, dentists, or lawyers — and the professionals attempt to run the pension plan to obtain the largest possible benefits for themselves. The appellate panel's decision is fundamentally flawed because it places the burden of deciphering in which role a employer/pension plan sponsor/ pension plan administrator/ pension plan trustee may be acting at any given moment squarely on the employee — the person with the least information. This duty to decipher becomes particularly onerous, if not impossible, when the employer/fiduciary engages in an ongoing course of conduct aimed at defrauding that employee.

While this is but one case of a lone retired employee in a small professional practice setting, the appellate panel's decision sets a disastrous precedent for every working man and woman in this country by jeopardizing all working persons' rights under ERISA-protected pension plans by (a) allowing pension plan fiduciaries, under their alternative guise as "employers," to defraud pension plan participants with impunity, and (b) allowing employers, under the pretext of "plan amendments," to discriminate against pension plan participants. Petitioner Ruth Haberern respectfully requests this Court to review the appellate panel's decision because of its far-reaching and detrimental consequences for this nation's pension participants.

I. The Appellate Panel's Decision Artificially Restricts a Person's Fiduciary Status Under ERISA When That Person Is Engaged in a Course of Conduct Related to the Management of a Pension Plan.

A. ERISA Was Enacted to Address Corruptly Mismanaged Pension Plans and the Scope of Its Pre-emption Is Broad.

Congress, concerned that many pensions were being corruptly mismanaged and that American workers were losing their financial security in retirement as a result, enacted ERISA,

> declaring it to be the policy of the statute to protect the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect to the plans, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Mertens v. Hewitt Assocs., 113 S. Ct. 2063, 2072 (1993)(White, J., with whom C.J. Rehnquist, J. Stevens and J. O'Connor joined, dissenting).

ERISA's "pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that 'relate[s] to' an employee benefit plan governed by ERISA." FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990). Further, ERISA's pre-emption extends beyond state laws specifically designed to affect only employee benefit plans. Id. at 58-59. This Court has held that "to interpret the pre-emption clause to apply only to state laws dealing with the subject matters covered by ERISA, such as reporting, disclosure, and fiduciary duties, would be incompatible with the provision's legislative history...." Id. at 58.

B. ERISA Defines "Fiduciary" in Functional Terms of Control and Authority Over a Plan.

ERISA provides that "a person is a fiduciary with respect to a plan to the extent he exercises any discretionary authority or discretionary control respecting management of such plan...." 29 U.S.C. § 1002(21)(A). ERISA also provides that not only the persons named as fiduciaries by a benefit plan, "but also anyone else who exercises discretionary control or authority over the plan's management, administration, or assets, is an ERISA 'fiduciary.'" Mertens, 113 S. Ct. at 2066 (majority opinion).

The inclusion of the phrase "to the extent" in 29 U.S.C. § 1002(21)(A) means that a party is a fiduciary only as to the activities which bring the person within the definition. "[A] court must ask whether a person is a fiduciary with respect to the particular activity at issue." Coleman v. Nationwide Life Ins. Co., 969 F.2d 54, 61 (4th Cir. 1992), cert. denied, 113 S. Ct. 1051 (1993). See, e.g., 29 C.F.R. § 2509.75-8 (1991); Licensed Div. Dist. No. 1 MEBA/NMU v. Defries, 943 F.2d 474, 477-78 (4th Cir. 1991) cert. denied, 112 S. Ct. 972 (1992); Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1158 (3d Cir. 1990); United Mine Workers of Am. v. Powhatan Fuel, Inc., 828 F.2d 710, 714 (11th Cir. 1987); Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enters., Inc., 793 F.2d 1456, 1459-60 (5th Cir. 1986); Leigh v. Engle, 727 F.2d 113, 133-35 (7th Cir. 1984).

The appellate panel failed to determine the employer/fiduciary's status with respect to the particular activity at issue here, i.e. scheme to institute and operate a pension plan by defrauding Mrs. Haberern. Instead, because the party was also an "employer", the panel broadly applied the at-will employment doctrine to render ERISA meaningless. The appellate panel's method of determining a party's fiduciary status under ERISA flies in the face of the statute and sets an ominous precedent for all pension participants.

ERISA "abounds with the language and terminology of trust law" and must be construed against the background of the common law of trusts, Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 110 (1989), and "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." Mertens, 113 S. Ct. at 2071.

ERISA defines "fiduciary" "not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of person subject to fiduciary duties — and to damages — under § 409(a).... Professional service providers such as actuaries become liable for damages when they cross the line from advisor to fiduciary." Mertens, 113 S. Ct. at 2071 (emphasis in original). ERISA assigns fiduciaries a number of detailed duties and responsibilities, which include "the proper management, administration,

and investment of fund assets . . . the disclosure of specified information, and the avoidance of conflicts of interest." Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 142-43 (1985); see 29 U.S.C. §§ 1104(a), 1105(a)("knowing participation" liability imposed on co-fiduciaries); see also Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990).

Equitable trust principles make plain that a company should not benefit from its misrepresentations, and courts have imposed fiduciary duties on employers for eve-of plan misrepresentations made by the employer. Elmore v. Cone Mills Corp., 23 F.3d 855, 875 (4th Cir. 1994). See Berlin v. Michigan Bell Telephone Co., 858 F.2d 1154, 1164 (6th Cir. 1988)(once a "fiduciary does communicate with potential plan participants after serious consideration has been given [to the plan], then any material misrepresentations may constitute a breach of their fiduciary duties"). See also Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750 (D.C. Cir. 1990)("[A] fiduciary bears an affirmative duty to inform a beneficiary of the fiduciary's knowledge of prejudicial acts by an employer — such as the failure of an employer to contribute to a fund as required.")

C. The Appellate Panel's Decision Artificially Restricts a Person's Fiduciary Status Under ERISA When That Person Is Engaged in a Course of Conduct Related to the Management of a Pension Plan.

The appellate panel failed to recognize that the employer/fiduciaries' activities went beyond a mere "design" or description of the plan as it existed but included a course of fraudulent conduct in establishing and maintaining the plan, including misrepresentations that her participation in the plan was mandatory, that she was required to fund her contribution to the plan, and that she would receive a pension equal to her salary.

What is remarkable about the appellate panel's decision is its evisceration of ERISA's principles and protections by categorically declaring that Pennsylvania's at-will employment doctrine immunizes an

employer's activities — no matter how fraudulent the scheme — related to the creation (and administration) of the pension plan. The appellate panel ignored the district court's finding of the fiduciaries' continuing course of fraudulent conduct as to how they instituted the plan; thus, the panel erroneously concluded that because the fiduciaries' conduct supposedly related to merely designing the plan, and not to administering the plan, then ERISA did not provide a remedy in this pension case.

Appellate courts have ruled that ERISA fiduciaries who function in other roles, such as employers or company officials, are permitted to "wear two hats," as "employers" and as "fiduciaries." Belade v. ITT Corp., 909 F.2d 736, 738 (2d Cir. 1990). Persons assume fiduciary status only when and to the extent that they function in their capacity as plan administrators or trustees. Id.; 29 U.S.C. § 1002(21)(A). In designing a plan, an employer is unconstrained by fiduciary responsibilities. Nazay v. Miller 949 F.2d 1323, 1329 (3d Cir. 1991); Trenton v. Scott Paper Co., 832 F.2d 806, 808-09 (3d Cir. 1987), cert. denied, 485 U.S. 1022 (1988). No one disputes Lehigh Valley's and McDonald's right to design the Defined Benefit Plan as they saw fit. It was their unfettered choice to design a voluntary plan in which the employer made the contributions.

At the trial, Mrs. Haberern testified in detail that the two doctors told her that her salary would be used to fund the newly created Defined Benefit Plan. (App. 124a). John Lisicky, Lehigh Valley's accountant who testified on behalf of Mrs. Haberern, also testified in detail that the two doctors decided to use Mrs. Haberern's compensation to fund her Defined Pension Benefit precisely because they didn't want to fund the required amount — despite the express terms of the Plan. (App. 128a-130a).

The trustees/employer/plan administrator's scheme to defraud Mrs. Haberern directly related to their ongoing administration of the pension plan. Thus, the district court properly found that Lehigh Valley and McDonald were functioning as "fiduciaries" and had breached their fiduciary duties under ERISA.

In administering a plan, an employer and plan fiduciaries are bound to fulfill their fiduciary duties. Nazay, 832 F.2d at 1329. And in this case, Lehigh Valley and McDonald engaged in a continuing course of fraudulent conduct — by using Mrs. Haberern's salary to fund the plan and by concealing from her that her participation was voluntary. In so doing, they unabashedly wore a "third hat": self-interest. And by so doing, they violated their fiduciary duties. Their ongoing conduct was in furtherance of their scheme to defraud Mrs. Haberern and their management and administration of the pension plan. Their deception of Mrs. Haberern and their management of the plan are inseparable.

II. Mrs. Haberern's Employment-At-Will Status Did Not Entitle Lehigh Valley To Violate the Explicit Terms of the Pension Plan or ERISA.

The appellate panel also adopted the position that Lehigh Valley had an unfettered right to divert Mrs. Haberern's salary to fund her pension — in direct violation of the Plan's terms — because her status as an at-will employee allowed Lehigh Valley "to decrease her compensation whether or not they had established a benefits plan." (App. 16a).

The panel's conclusion that the at-will employment doctrine shields an employer/fiduciary against its obligations under ERISA — and the explicit terms of a pension plan — is erroneous because ERISA pre-empts any state law relating to the protection of employee pension benefits, including use of the at-will employment doctrine as a defense to violating a pension plan's explicit terms. 29 U.S.C. § 1144(a). An employer cannot defraud an employee by using the employee's salary to avoid the employer's obligation to contribute to the employer funded pension plan.

In Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990), the employer claimed it could terminate an at-will employee for any reason, regardless of ERISA, because the state law employment at-will doctrine was controlling. This Court held that ERISA pre-empted state law regarding wrongful discharge, stating:

> We have no difficulty in concluding that the cause of action which the Texas Supreme Court recognized here — a claim that the employer wrongfully terminated plaintiff primarily because of the employer's desire to avoid contributing to or paying benefits under the employee's pension fund — 'relates to' an ERISA-covered plan within the meaning of §514(a) [29 U.S.C. § 1144(a)] and is therefore pre-empted.

498 U.S at 140.

Similarly, the appellate panel's determination that Pennsylvania's at-will employment law broadly prevails over ERISA and exonerates their violation of the explicit terms of the Plan, as well as their fiduciary duties under ERISA, ignores ERISA's broad pre-emption provision.

A. Using An Employee-At-Will's Salary to Fund Her Pension, In Direct Violation of the Plan's Terms, Violates Public Policy.

The appellate panel's decision turns the phrase "pension benefits" on its head. Typically, a benefit is added to one's compensation. As the plan's actuary who testified on behalf of the defendants freely admitted at the trial, no employee in her right mind would turn down such a "benefit" because all the money was coming from the employer. (Riley Test. at App. 131a).

In Mrs. Haberern's situation, however, because two highly compensated doctors wanted to shelter their excess income, because they needed a certain percentage of the employees to be participants in the Defined Benefit Pension Plan for it to take effect, and because the doctors were unwilling to spend about an additional $4,500 to fund Mrs. Haberern's pension, the doctors forced Mrs. Haberern to take a severe reduction in her salary to fund a pension benefit plan that she did not want or need. (Haberern Test. at App. 124a). It is pure sophistry in this case to assert, as the Court of Appeals panel did, that the plan fiduciaries fulfilled the requirement that the employer fund the plan because the dollars came from the employer. From the point of

view of the employee who was in one year making $18,358 but in the next, instead of getting her usual raise, making about $14,429, it is she, not the employer, who is funding the plan. Moreover, the uncontradicted testimony shows that the plan fiduciaries decided to have Mrs. Haberern fund the plan and so stated to both their accountant and Mrs. Haberern. Thus, the district court's finding is not only entitled to deference, but indeed must be treated as conclusive because there is nothing in the record to contradict that fact.

The fiduciaries' calculated abuse of an elderly employee — merely to further their financial self-interest — is shocking. Far more important, unless the Court of Appeal's decision is reversed, employees across the country may be defrauded and have their salaries slashed in the name of "employer" funded pension "benefits."

B. The Panel's Decision Ignores the Crucial Finding of Fact That the Fiduciaries Misled Mrs. Haberern About the Pension Plan.

In the name of defending the inalienable right of employers to treat at-will employees in a completely untrammeled way, the panel ignored the crucial fact that the pension plan fiduciaries lied to Mrs. Haberern that her participation in the pension plan was mandatory when, in fact, it was voluntary.

The fact that two doctors — who were the pension plan's trustees and the sole shareholders in Lehigh Valley, the plan administrator and sponsor — affirmatively misled Mrs. Haberern, despite her protests, was never contradicted.

The appellate panel concluded that, although the plan fiduciaries affirmatively misled Mrs. Haberern, this 57-year-old woman's only remedy, if she did not like the arrangements, was to quit. (App. 16a). In reaching this remarkable conclusion the panel ignored substantial, uncontradicted evidence about the pernicious effects of the fraud on Mrs. Haberern.

On cross-examination, Mrs. Haberern testified as follows:

Q: At that point in time you knew that going forward from 1979 or 1980, whenever that discussion was, that your compensation arrangement with the corporation was changing?

Mrs. Haberern: Yes, I did.

Q: All right. And you continued to work there?

Mrs. Haberern: Oh, absolutely because I was told that, excuse me, I was told that they were going to fund the defined benefit plan as I said so many times and that when I retired, I would get a pension equal to my salary. That is the one and only reason I stayed, I wouldn't take a big percentage loss and continue to work for them.

(App. 126a).

Mrs. Haberern's testimony was not challenged. The uncontradicted evidence is that the employer/fiduciaries' scheme succeeded: their affirmative misrepresentations specifically induced Mrs. Haberern to continue working for her employer. The panel's decision, nonetheless, side-stepped that devastating fact. Because the panel ignored the fraud committed on Mrs. Haberern, the panel's decision directly conflicts with ERISA and all pertinent case law.

The evidence is clear: the wrongdoers, who were pension plan fiduciaries, affirmatively misled Mrs. Haberern specifically to force her into the pension plan. The panel's approval of pension fiduciaries affirmatively misleading pension participants results in a decision that directly conflicts with ERISA, Supreme Court and Third Circuit case

law, and jeopardizes the rights of all pension participants. See ERISA §§ 2(b)[5] and 404(a)[6]; NLRB v. Amax Coal Co., 453 U.S. 322, 329-34 (1981)(sole obligation of pension plan trustees is to protect the interests of beneficiaries, regardless of the effect on employer).

This Court should accept review of the appellate panel's decision to prevent a clear injustice and violation of ERISA, not only for Mrs. Haberern, but for all other pension participants who may find themselves similarly at the mercy of employers who cavalierly ignore their obligations to fund pensions by duplicitously reducing employee salaries.

III. The Panel's Approval of a Discriminatory Pension Plan Amendment Is Contrary to ERISA.

The District Court, applying Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.), cert. denied, 484 U.S. 979 (1987), held that Lehigh Valley had the discriminatory intent of interfering with Mrs. Haberern's benefits in violation of ERISA § 510, 29 U.S.C. § 1140, by amending its pension plan to eliminate only Mrs. Haberern's life insurance benefit while tripling this benefit for all other plan participants. Accepting Lehigh Valley's discriminatory intent, the panel nonetheless reversed the district court's holding. The panel, relying on McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993), held that ERISA § 510 does not apply because, while ERISA prohibits discrimi-

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5. ERISA § 2(b), 29 U.S.C. § 1001(b), provides:

It is hereby declared to be the policy of this chapter to protect ... the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

6. ERISA § 404(a), 29 U.S.C. § 1104(a), provides in part, "[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries."

nation interfering with plan rights, it does not prohibit discriminatory plan amendments. (App. 24a-26a).

ERISA § 510, 29 U.S.C. § 1140, prohibits employers from discriminating against employees for the purpose of interfering with certain benefits to which they are or may become entitled. Section 510 provides in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C. § 1140.

To prove a prima facie case under ERISA § 510, an employee must demonstrate: (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee is or may become entitled. Gavalik, 812 F.2d at 852. Once the plaintiff proves a prima facie case, the employer must present a legitimate nondiscriminatory reason for the change such as cost-savings. If the employer presents such a reason, the employee must show that the employer's asserted reason is pretextual. Id. at 851-53.

Plaintiff makes a prima facie case in a plan amendment case if the plaintiff can show that (1) at the time a plan amendment was instituted, plaintiff was the only person affected by the amendment, (2) defendants intended that the plaintiff would be affected by the amendment, and (3) a plan amendment changed a benefit to which the plaintiff was or would have become entitled. There is no basis in ERISA for limiting § 510 actions to only those which seek "pension benefits." Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990). Prohib-

iting discriminatory interference with plan rights but permitting discriminatory amendments to a plan is a distinction without a difference.[7]

The appellate panel's decision, and the McGath decision on which it relied, too narrowly construe the protections of ERISA § 510. ERISA § 510 is based upon the language of § 8(a)(3) of the National Labor Relations Act (NLRA).[8] West v. Butler, 621 F.2d 240, 245 (6th Cir. 1980). While both NLRA § 8(a)(3) and ERISA § 510 apply to the "employment relationship," the appellate panel construed "employment relationship" much too narrowly. This Court, in Radio Officers' Union v. NLRB, 347 U.S. 17, 39-42, 46 (1954), made it clear that § 8(a)(3) cover not only hiring, firing, transferring, promotion and discharge, but the granting of wage increases and the withholding of benefits. In applying this Court's interpretation of the words of NLRA § 8(a)(3) to the identical words in ERISA § 510, § 510 must also include protection against not only discrimination in hiring, firing, promotion, and transferring, but also against discrimination in other terms and conditions of employment, including wages and benefits. See generally Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756 (1979)(where two statutes share a common purpose, the language of one section is in haec verba with the other, and the legislative history of one section indicates that the source was the other section, the construction of the more recent section should follow the other).

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7. Three Circuit Courts have reviewed the applicability of § 510 to plan amendments. The Eleventh and Fifth Circuits in Owens v. Storehouse, Inc., 984 F.2d 394 (11th Cir. 1993) and McGann v. H&H Music Co., 946 F.2d 401 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992), ruled in favor of the employers because discrimination was lacking, i.e., the employer had legitimate cost-saving reasons. As discussed infra at p. 19, the Seventh Circuit's recent decision in McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993) misconstrued the National Labor Relations Act and the protections of ERISA § 510.

8. Section 8(a)(3) of the NLRA provides in pertinent part that "it shall be an unfair labor practice for an employer . . . [to] discriminat[e] in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3).

Moreover, the appellate panel's decision that ERISA § 510 does not protect an employee when her employer amends a pension benefit plan, but protects an employee when she is terminated or otherwise disciplined leads to an anomalous result. Under this restrictive view, while § 510 protects an employee from losing her job if the loss resulted from a discriminatory motive to reduce or eliminate the employee's benefits, it does not protect the same employee when the same discriminatory motive results in a loss or reduction of the same benefits under the pretext of a plan amendment. The appellate panel's position permits an employer to do indirectly by plan amendment what it cannot do directly by termination, and ultimately exposes all pension plan participants in this country to the threat of unjust discrimination under the facade of plan "amendments."

CONCLUSION

Petitioner Ruth Haberern respectfully petitions this Court for a writ of certiorari to review the appellate panel's decision. This Court should review the decision because of its far-reaching and detrimental consequences for this nation's pension participants. The decision artificially restricts a person's fiduciary status under ERISA and improperly places the burden of deciphering in which role a employer/fiduciary may be acting at any given moment, upon an employee — the person with the least information. Furthermore, this duty to decipher is particularly unfair, if not impossible, when the employer/fiduciary engages in an ongoing course of conduct aimed at defrauding that employee.

The appellate panel's decision that ERISA prohibits discriminatory interference with plan rights but permits discriminatory plan amendments is a distinction without a difference. The appellate panel's position permits an employer to do indirectly by plan amendment what

it cannot do directly by termination, and ultimately exposes all pension plan participants in this country to the threat of unjust discrimination under the facade of plan "amendments."

Respectfully submitted,

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Filed May 25, 1994

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-1892

RUTH HABERERN

v.

KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PENSION PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; KENNETH M. MCDONALD, M.D., TRUSTEE

Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan and Trust Agreement, Lehigh Valley Vascular Surgeons Ltd. Retirement Plan, Lehigh Valley Vascular Surgeons Ltd. and Kenneth M. McDonald, Trustee,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 88-01853)

Argued March 28, 1994

BEFORE: GREENBERG, COWEN,
and NYGAARD, Circuit Judges

(Filed: May 25, 1994)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge*.

I. OVERVIEW

The four appellants, Lehigh Valley Vascular Surgeons, Ltd. ("Lehigh Valley"), two employee pension plans established by Lehigh Valley, Kaupp Vascular Surgeons Ltd. Defined Benefit Pension Plan and Trust Agreement and Lehigh Valley Vascular Surgeons Ltd. Retirement Plan, a defined contribution plan, and the plans' trustee, Kenneth M. McDonald, M.D., appeal from a final judgment entered by the district court in favor of the appellee, Ruth Haberern, a retired employee of Lehigh Valley.[1] The district court entered the judgment in accordance with its opinion reported as *Haberern v. Kaupp Vascular Benefits Plan and Trust Agreement,* 822 F. Supp. 247 (E.D. Pa. 1993). The total judgment was for $614,165.99, but the court broke it down into segments. Haberern brought this action under section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(1)(B), to recover compensation allegedly due from Lehigh Valley and benefits she claimed under the plans, and to enforce her rights under the plans.

The appellants make five challenges to the district court's opinion and judgment. They contend that the district court erred when it concluded that Lehigh Valley acted as an ERISA fiduciary when it reduced Haberern's salary by eliminating her compensation based on Lehigh Valley's gross receipts and it contemporaneously created the defined benefit plan. They also contend that the district court erred in conclud-

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[1] We recently have explained the distinction between defined benefit and defined contribution plans. See *Malia v. General Elec. Co.*, No. 92-7487, slip. op. at 5 n.2 (3d Cir. May 13, 1994).

ing that Lehigh Valley breached its fiduciary duty in paying a portion of Haberern's compensation as a bonus and in making assurances to Haberern regarding her benefits under the defined benefit plan, without explaining that the designation of part of her compensation as a bonus would adversely affect her benefits. While these assurances were inconsistent with the terms of the plan, the appellants contend that the court nevertheless erred, as the terms were in the plan and also were described in the summary plan description which the appellants provided to Haberern. In the appellants' view, these disclosures relieved them of any duty to explain the plan further. Alternatively, the appellants argue that recovery on this claim is barred because damages for a breach of fiduciary duty cannot be awarded to a plan beneficiary under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

The appellants also challenge the district court's conclusion that Lehigh Valley violated section 510 of ERISA, 29 U.S.C. § 1140, by amending its defined benefit plan to eliminate Haberern's life insurance coverage while simultaneously increasing the life insurance for other beneficiaries. Finally, the appellants challenge the district court's conclusion that Haberern requested information about her benefits under the defined benefit plan which appellants, in violation of section 105(a) of ERISA, 29 U.S.C. § 1025(a), did not provide and the court's consequent assessment of $191,300 in penalties for the appellants' failure to provide that information.[2] The district court also concluded that the appellants breached a fiduciary duty under ERISA by requiring Haberern to sign a release before they distributed her accrued benefits under the defined contribution plan, but the appellants do not challenge that ruling.

We agree with the appellants on all issues they raise. In particular, we find that the reduction in Haberern's salary was a management

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[2] The district court also found that the appellants violated section 101(a)(1), 29 U.S.C. § 1021(a)(1), by failing to furnish Haberern a complete summary plan description of the defined benefit plan, but we need not consider this point as the court imposed the penalty only for the appellants' failure pursuant to section 105(a)(1) to provide a statement showing how they computed Haberern's defined benefit plan distribution.

decision for which they cannot be liable under ERISA. Additionally, we conclude that Haberern cannot recover under section 502(a)(1)(B) of ERISA for the appellants' alleged breach of fiduciary duty in designating part of her compensation as a bonus and in not informing her of the consequences of that designation with respect to her retirement benefits. We also hold that the appellants did not violate section 510 of ERISA, 29 U.S.C. § 1140, when they amended the defined benefit plan to eliminate life insurance coverage for plan beneficiaries over age 56. Finally, we determine that the district court's conclusion that a letter Haberern's attorney sent to the appellants' attorney was a request for information within the meaning of section 105(a), 29 U.S.C. § 1025(a), is erroneous as a matter of law. For these reasons, we will reverse the district court's judgment awarding damages on all these grounds.

We make one further preliminary observation. In our review of this case, we have noted a comment in the appellants' brief that the district court barely distinguished among the appellants in reaching its conclusions. Furthermore, we recognize that the district court may have entered judgment on certain claims against particular appellants not liable on those claims. Nevertheless, in view of our conclusion that we must reverse on all issues they raise, for the most part we do not find it necessary to distinguish among the appellants. Accordingly, usually we will refer to the appellants collectively rather than individually.

II. BACKGROUND

The historical facts of this case are not in dispute and, as the district court discussed them at length in its opinion, we need not repeat them in detail. We will, however, set forth matters of particular significance to this opinion. Haberern began working for Kaupp Vascular Surgeons Ltd. on July 1, 1974, as a secretary-bookkeeper. Kaupp's principals, Harry A. Kaupp, M.D., and McDonald, changed its corporate name to Lehigh Valley Vascular Surgeons Ltd. in 1984, and as a matter of convenience, we refer to Kaupp Vascular Surgeons and Lehigh Valley Vascular Surgeons as "Lehigh Valley." Haberern

worked full-time for Lehigh Valley until her retirement on January 2, 1985, and from January 3, 1985 to December 16, 1986, she continued working part-time. During her employment, she never had a written employment contract.

In 1974, Haberern and Kaupp were Lehigh Valley's only employees. Haberern's initial compensation included an annual salary of $11,500, a percentage of Lehigh Valley's gross receipts, status as a beneficiary of the defined contribution pension plan, and health insurance. At that time, the defined contribution plan was known as the Kaupp Vascular Surgeons Ltd. Employee Pension Plan, but Lehigh Valley later changed the plan's name to Lehigh Valley Vascular Surgeons Ltd. Retirement Plan. Originally Kaupp and his wife were the trustees of the defined contribution plan, but McDonald later became the trustee. Lehigh Valley paid Haberern's salary biweekly, and it paid her percentage of gross receipts at the end of each fiscal year.

In 1976, McDonald joined Lehigh Valley and, effective September 1, 1979, McDonald and Kaupp established the defined benefit plan. When they established the defined benefit plan, McDonald and Kaupp calculated the amount necessary to fund it, and concluded that based on Haberern's salary of $19,000, Lehigh Valley would have to contribute approximately $10,000 annually on her behalf. They regarded this contribution as excessive, so in 1980 they eliminated the portion of Haberern's compensation calculated on Lehigh Valley's gross receipts. This change reduced Haberern's overall compensation for the fiscal year endIng June 30, 1979, from $18,358 to $14,429, and required Lehigh Valley to contribute $5,500 to the plan on her behalf.

The appellants did not tell Haberern that the defined benefit plan required Lehigh Valley to make the contributions to the plan on her behalf. Though the appellants provided Haberern with a copy of the summary plan description, the pages regarding contributions to the plan and the provisions for insurance, as well as the table of contents were omitted, and the appellants did not provide her with a complete copy of the summary plan description until 1987. Beginning in 1980, Lehigh Valley designated part of Haberern's compensation as salary"

and part as "bonus," and it gave the same designations to Kaupp's and McDonald's compensation. This allocation was significant because benefits under the defined benefit plan were predicated on salary excluding any bonus. Accordingly, this allocation reduced the benefits which otherwise would have been due to Haberern, and it also reduced Lehigh Valley's contributions to the plan. *Haberern*, 822 F. Supp. at 254.

The defined benefit plan provided for life insurance equivalent to 30.58 times the participant's monthly retirement benefit. On October 21, 1980, Lehigh Valley amended the plan to eliminate life insurance for employees over age 56, a category which included only Haberern. However, the life insurance for the other beneficiaries was tripled. The appellants claim that they made these life insurance changes to save money, but the district court rejected this claim.

In 1984, Haberern informed the appellants that she intended to retire. Although she did retire on January 2, 1985, the plans did not pay her pension benefits immediately. Instead, on July 18, 1986, the appellants requested that Haberern sign releases as a condition for receiving distributions from both plans. Haberern refused to sign the releases, and consequently the appellants refused to pay her any benefits. Then in July 1987, the appellants sent Haberern a check for $42,986.24 which they stated represented her full benefits under the defined benefit plan. But they still refused to pay Haberern her benefits under the defined contribution plan as she did not provide the release.

Haberern filed the complaint in this action on March 3, 1988, pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). She alleged that the appellants breached their fiduciary duties and discriminated against her by withholding her pension benefits, eliminating her percentage of gross receipts, dividing her compensation between salary and bonus, amending the defined benefit plan to eliminate her life insurance coverage, and failing to respond to her request for information. After a three-day bench trial, the district court found the appellants liable for life insurance coverage, benefits under both the defined ben-

efit and defined contribution plans, lost salary, and penalties for failure to provide information concerning her benefits under the defined benefit plan. *Haberern*, 827 F. Supp. at 267-68. As we have indicated, the appellants appeal from all aspects of the district court's final judgment except the finding that they breached a fiduciary duty under ERISA by requiring Haberern to sign a release before they distributed her accrued benefits under the defined contribution plan.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We are exercising plenary review, as we are deciding this case through the application of legal precepts on the facts as found by the district court. While the district court's assessment of penalties for the appellants' failure to comply with section 105(a), 29 U.S.C. § 1025(a), in some circumstances might be reviewed under an abuse of discretion standard, we are exercising plenary review on the point because we conclude that the letter from Haberern's attorney cannot be construed as a request under that section. *Cf. Sheet Metal Workers, Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1279 (3d Cir. 1991) (construction of collective bargaining agreement reviewed de novo).

III. DISCUSSION

A. Elimination of Haberern's Gross Receipts Percentage and the Funding of the Defined Benefit Plan

The appellants first challenge the district court's finding that Lehigh Valley breached its fiduciary duty under ERISA when it eliminated the gross receipts percentage component of Haberern's compensation. This alleged breach focused on the appellants' establishment in 1979 of the defined benefit plan which provided benefits calculated on certain factors such as age, compensation, and years of employment. Prior to the creation of the defined benefit plan, Lehigh Valley paid Haberern her salary bi-weekly and her percentage of its gross receipts annually. Haberern claims that ERISA compelled the appellants to include her in the plan, and asserts that to include her, but to keep down its contributions to the plan, the appellants eliminated Haberern's percentage of gross receipts. The district court concluded:

> In 1980 Lehigh Valley eliminated the portion of [Haberern's] compensation that was calculated on the basis of Lehigh Valley's gross receipts thus reducing [Haberern's] compensation from $18,358 for the fiscal year ending June 30, 1979 to $14,429 for the fiscal year ending August 31, 1980. (Lehigh Valley had changed its fiscal year from July to June to September to August.) Based upon a salary of $19,000, Lehigh Valley would have to contribute approximately $10,000 on behalf of [Haberern] into the newly formed Defined Benefit Plan. The doctors felt this was too much. Therefore, they reduced her salary to $14,400, thus requiring Lehigh Valley to contribute only $5,500 to the Defined Benefit Plan. *By virtue of the elimination of her receivables percentage, [Haberern] was taking her salary and funding her Defined Benefit Plan.*

Haberern, 822 F. Supp. at 254 (citations omitted) (emphasis added).

The district court also found that the appellants did not inform Haberern that Lehigh Valley was required to make the contributions to the plan. *Id.* In fact, the district court found that in 1980 the appellants provided Haberern with a summary plan description but omitted the pages stating Lehigh Valley was required to make the full contribution required to fund the plan on her behalf.

Based on these facts, the district court held that the appellants breached their fiduciary duty. In computing damages, the court concluded that the appellants were liable not only for the lost compensation predicated on the 1980 salary reduction, but also for the reduction of benefits under the defined benefit plan, which, but for the wrongdoing, would have been calculated on a higher salary, and the reduction of benefits under the defined contribution plan, which, but for the wrongdoing, would have reflected contributions based on a higher salary. *Id.* at 257.

However, the court also concluded that the reduction in salary did not violate ERISA's anti-discrimination provisions. 29 U.S.C. § 1140. In this regard, in a pretrial opinion granting the appellants summary judgment on Haberern's discrimination claim relating to the reduction in salary, the court noted:

> In this case, the reduction in [Haberern's] salary ... [was] consistent with the treatment of all other plan participants, including the physician plan participants. The payroll records furnished by defendants established that the salaries of all plan participants were substantially reduced in 1980.

App. at 136 (citations omitted).

The appellants raise two challenges to the district court's conclusion that in eliminating Haberern's percentage of gross receipts and creating the defined benefit plan they violated their fiduciary duties under ERISA. First, they argue that they took these steps as employers, and not as fiduciaries, and thus they did not owe a fiduciary duty to Haberern. Second, they argue that Haberern's status as an at will employee allowed them to change her compensation at any time.[3] Accordingly, they contend that by continuing to work after 1980 she accepted the modified terms of her employment. The district court responded to these points by indicating that "simply because [Haberern's] employment was at will does not entitle Lehigh Valley to violate ERISA." 822 F. Supp. at 260.

The appellants rely on section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D), and on several of our opinions for the proposition that when an employer acts in a management capacity, its business decisions are not regulated by ERISA. *See Nazay v. Miller*, 949 F.2d 1323, 1329 (3d Cir. 1991); *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155, 1158 (3d Cir. 1990). *See also, e.g., Malia v. General Elec. Co.*, No. 92-7487, slip op. at 9-10 (3d Cir. May 13, 1994). Section 404(a)(1)(D) imposes a fiduciary duty on a trustee when administering

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[3] In our discussion of appellants' division of Haberern's compensation into salary and bonus, we consider whether a plan beneficiary may bring an action under section 501(a)(1)(B) of ERISA for breach of fiduciary duty. We do not address that point in this section of our opinion, as the appellants do not contend that Haberern could not bring an action for breach of fiduciary duty predicated on the appellants' elimination of Haberern's compensation based on gross receipts, if the elimination was wrongful. Of course, we are holding that the elimination of the compensation based on gross receipts does not implicate any fiduciary obligation under ERISA which the appellants might have owed Haberern.

an ERISA plan to act in accordance with the documents and interests governing the plan, but it does not impose fiduciary duties on an employer making a management decision. The appellants contend that because of Haberern's at will status, their business decision affecting her compensation and establishing the defined benefit plan was not subject to ERISA's fiduciary provisions, "notwithstanding [its] collateral effect on prospective, contingent employee benefits." Brief at 15 (*quoting Bell v. Allstate Ins. Co.*, 822 F. Supp. 1222, 1224 (D.S.C. 1992)). Haberern responds that the appellants' contentions are without merit because ERISA preempts state laws relating to the protection of employee pension benefits and, accordingly, regardless of the appellants' rights under state law, their conduct violated their ERISA fiduciary duties.

Haberern's reliance on ERISA preemption is misguided. She cites *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478 (1990), in support of her position. In *Ingersoll-Rand*, the plaintiff brought a state common law claim for unlawful discharge in a Texas state court. *Id.* at 136, 111 S.Ct. at 481. He claimed that his employer discharged him to avoid making contributions on his behalf to a pension plan. The trial court granted the employer summary judgment, and the state court of appeals affirmed, holding that the plaintiffs employment was terminable at will. The Texas Supreme Court reversed and remanded for trial. That court held that under Texas law, an at will employee could sue for wrongful discharge if he could establish that the employer's principal reason for the discharge was to avoid paying pension benefits or to avoid contributing to a plan.

The United States Supreme Court granted certiorari and reversed. The Court noted that Congress expressly included a broad preemption provision in ERISA, section 514(a), 29 U.S.C. § 1144(a), which provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

The Court noted "'[a] law "relates to" an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan.'" *Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 483 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900 (1983)).

In the Texas case, the plaintiff was required to prove that the principal reason for his termination was to interfere with a plan. This required him to plead, and the court to find, that there was an ERISA plan and that the employer had a pension-defeating motive in discharging him. Because this inquiry was directed to the existence of a plan, the "judicially created cause of action 'relate[s] to' an ERISA plan." *Ingersoll-Rand,* 498 U.S. at 140, 111 S.Ct. at 483. Thus, it was preempted.

The Court noted, however, that ERISA's preemptive force has limits. Thus, in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211 (1987), the Court had held that ERISA did not preempt a Maine law which required the payment of severance benefits because the state law did not require the establishment or maintenance of an ongoing plan. *Ingersoll-Rand* 498 U.S. at 139, 111 S.Ct. at 483. In the Texas case, this limitation did not apply because the case did not involve "a generally applicable statute that makes no reference to, or indeed functions irrespective of, the existence of an ERISA plan." *Id.*

The limitation on the preemptive force of ERISA recognized in *Fort Halifax* and *Ingersoll-Rand* is applicable in this case. In Pennsylvania, absent a statutory or contractual provision to the contrary, employment relationships presumptively are at will. *Schoch v. First Fidelity Bancorporation,* 912 F.2d 654, 658 (3d Cir. 1990). This presumption is unrelated to the existence *vel non* of any pension plan. Of course, it follows that if an employer may terminate an employee without cause, it has the right to decrease her compensation, as this constitutes a more modest change in the employment relationship. Clearly, this right to decrease compensation "functions irrespective of... the existence of ERISA," and therefore is beyond the scope of ERISA preemption. *Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 483.

Accordingly, inasmuch as ERISA does not preempt the appellants' state law management rights to determine Haberern's salary, the critical question is whether they were acting in their management capacity when they reduced Haberern's salary by eliminating the portion of her compensation based on gross receipts and contemporaneously created the defined benefit plan. If they were, then they breached no duty under ERISA for, as they contend, ERISA does not impose fiduciary duties on employers acting in their management capacity. 29 U.S.C. §1104(a)(1).

Nazay v. Miller, 949 F.2d 1323, is instructive. In *Nazay*, a retired employee brought suit against his former employer under ERISA to recover the balance due for his hospitalization after the employer's health plan only partially paid a hospital bill he had incurred. *Id.* at 1325-27. The employee had admitted himself to a hospital after his physicians agreed that it was imperative that he be treated for a heart condition. Though the employee was aware that the plan required certification by the plan administrator prior to a hospital admission, he nonetheless did not notify the administrator before he entered the hospital. Furthermore, neither his doctors nor anyone else notified the administrator of the admission during his stay.

The certification process enabled the administrator to consider whether hospitalization was necessary and to consider alternatives to hospitalization. Additionally, it allowed the patient and hospital to ascertain how much of the proposed hospitalization would be reimbursed. The plan included a penalty amounting to 30% of the otherwise covered expenses if the employee failed to obtain preadmission certification. *Id.* at 1326.

The district court held that the penalty provision was arbitrary and capricious. *Id.* at 1325. Further, the court held it would not enforce any provision in a benefit plan that denied benefits, unless the employer could establish that the participant's failure to comply with the provision prejudiced the plan. *Id.*

We reversed, concluding an employer is free to develop an employee benefit plan as it wishes because when it does so it makes a

corporate management decision, unrestricted by ERISA's fiduciary duties. *Id.* at 1328-31. In discussing the nature of an employer's fiduciary duties under ERISA, we noted "[i]n the words of the Supreme Court, ERISA was 'designed to promote the interests of employees and their beneficiaries in employee benefit plans.' However, as we have observed on several occasions, ERISA's concern is with the *administration* of benefit plans and not with the precise design of the plan." *Id.* at 1329 (emphasis in original) (citations omitted). Therefore, if an employer also acts as a plan administrator, "ERISA permits [it] to wear two hats, and ... [it] assume[s] fiduciary status only when and to the extent that [it] function[s] in [its] capacity as plan administrator[], not when [it] conduct[s] business that is not regulated by ERISA." *Id.* (citations and internal quotation marks omitted). Although we recognized that the determination of whether an employer acts as a business manager or plan administrator involves a sensitive analysis, we concluded that an employer's inclusion of a penalty provision in a benefits plan is a management decision. *Id.*

Earlier, in *Trenton v. Scott Paper Co.*, 832 F.2d. 806 (3d Cir. 1987), *cert. denied*, 485 U.S. 1022, 108 S.Ct. 1576 (1988), we endorsed the design/administration distinction. In that case, Scott Paper Company had created a Salaried Employee Retirement Plan ("SERP") as well as a Scott Highly Accelerated Retirement Program ("SHARP"). *Id.* Scott created SHARP to provide an incentive to salaried employees at certain of its overstaffed facilities to retire early. *Id.* But some of the salaried employees eligible for retirement under SERP were not eligible for the more favorable treatment under SHARP. The plaintiffs, a class of employees covered by SERP but not by SHARP, brought suit alleging that their exclusion violated ERISA. The district court granted the defendants' motion for summary judgment and we affirmed.

The plaintiffs argued that the *amending* of SERP to include SHARP was an ERISA administration decision. Alter considering who had the authority to design and implement SHARP, we disagreed. In reaching our conclusion, we indicated that "[i]f SHARP had been a part of SERP when SERP was implemented, SHARP would clearly be

part of the *design* of the plan." *Id.* at 809 (emphasis in original). We then stated that, "[w]e think it clear in this action that Scott, not the Retirement Board, had the sole authority to determine who would be eligible for SHARP. The design of the SHARP plan was purely a corporate management decision." *Id. Accord Bell v. Allstate Ins. Co.*, 822 F. Supp. 1222 (D.S.C. 1992) (Allstate's decision not to include commissions from state auto reinsurance mechanism was design decision outside the scope of ERISA).

It is quite plain from our opinions that the appellants' decision to reduce Haberern's compensation by eliminating her percentage of gross receipts and to establish the defined benefit plan was managerial in character. The fact that this decision may not have been in Haberern's interest makes no difference. Furthermore, the district court's statement that, contrary to the terms of the defined benefit plan, the appellants required Haberern to fund her own benefits is nothing more than the court's pejorative characterization of the undisputed facts. Accordingly, we cannot sustain the court's determination by treating it as a factual finding subject to deferential review.[4] Thus, the appellants are not liable for their decision to reduce Haberern's compensation and contemporaneously to establish the defined benefits plan.

Haberern also argues that the appellants did not inform her that her participation in the plan was voluntary. But this point is immaterial.

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[4] The fallacy in the argument that Haberern funded the defined benefit plan may be demonstrated by considering the collective bargaining process. In contract negotiations, the employees' representative might obtain a pension plan fully funded by the employer and in return might agree to accept a less favorable wage structure than it could have obtained if the employer had not created a pension plan. In that situation, it hardly could be argued fairly that by paying the negotiated wage scale the employer has required the employees to fund the pension plan. In principle, the situation here is no different because the appellants' decision to set Haberern's compensation in light of their expenses for a pension plan is identical to an employer's decision to accept a collective bargaining agreement that adds to its pension costs but moderates wages. On the other hand, this case would have been different if the appellants had withheld money from Haberern's established salary for payment into the defined benefit plan.

While we will assume without deciding that Haberern could have refused to participate in the defined benefits plan, and we further will assume without deciding, as she contends, that the plan could not have become effective without her participation, it does not follow that the appellants could not have reduced her salary without regard for whether she participated in the defined benefit plan. Quite to the contrary, under Pennsylvania law they had the right to decrease her compensation whether or not they had established a benefits plan. Therefore, Haberern's only remedy if she had been unwilling to continue her employment for the compensation offered was to resign. Of course, she did not do so. Thus, it is clear that Haberern should not have recovered a judgment against the appellants by reason of their elimination of her gross receipts percentage and their method of the funding of the defined benefit plan.

B. The Designation of Haberern's Compensation as Salary and Bonus

The district court imposed substantial liability on the appellants due to Lehigh Valley's division of Haberern's compensation into salary and bonus. It found that Haberern's salary throughout the period during which the defined benefits plan was in effect, September 1, 1979 to August 31, 1984, remained at $14,428, and that the appellants paid her bonuses during that time. Lehigh Valley first divided her compensation into salary and bonus in 1980, but it did this for Kaupp and McDonald as well. *Haberern*, 822 F. Supp. at 254. The division was significant because pension benefits were based on salary but not bonuses. *Id.* But on a pretrial motion for summary judgment, the district court determined that this designation was not discriminatory in violation of 29 U.S.C. § 1140. In this regard, the court explained:

> Further, all plan participants took a portion of their compensation as 'bonus.' Indeed, the bonuses paid to physician plan participants were a greater portion of their total compensation than the bonuses paid to plaintiff.

App. at 137 (citations omitted).

Furthermore, the district court acknowledged that an employer may define compensation for purposes of calculation of pension benefits to include certain items and to exclude others. *Haberern*, 822 F. Supp. at 261. However, if an employer amends a plan to alter the definition of compensation, it must provide adequate notice to the beneficiaries. *See* section 204(h) of ERISA, 29 U.S.C. § 1054(h). In this case, there was no amendment, as the original plan excluded bonuses from the definition of compensation. Thus, the district court recognized that the notice requirements of section 204(h) did not apply.

Nonetheless, the district court effectively imposed a notice requirement, concluding that:

> when Lehigh Valley established the Plan, *they assured* [Haberern] that she would receive a pension benefit equal to her salary upon retirement. Because Defendants Lehigh Valley and McDonald *failed to inform* [Haberern] that characterizing a portion of her compensation as a bonus would reduce significantly her pension benefits, they breached their fiduciary duties under ERISA.

Haberern, 822 F. Supp. at 261 (emphasis added). Based on its conclusion that the appellants breached their fiduciary duties, the district court ultimately awarded damages under section 502(a)(1)(B) for the decreased benefits for which Haberern was eligible under the defined benefit plan and the defined contribution plan. Thus, the court seems to have concluded that the appellants misrepresented the method of computing Haberern's retirement benefits and it further concluded that their failure to inform her of the significance of the division of her compensation into salary and bonus was a breach of fiduciary duty.

Haberern supports the district court's conclusions by relying on a line of cases for the proposition that fiduciaries breach their duties of loyalty and care if they mislead plan participants or misrepresent the terms or administration of a plan. *See Berlin v. Michigan Bell Tel Co.*,

858 F.2d 1154, 1163 (6th Cir. 1988); *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592,599-600 (3d Cir. 1981), *cert. denied*, 454 U.S. 898, 102 S.Ct. 398 (1981); *Eddy v. Colonial Life Ins. Co.*, 919 F.2d 747, 750 (D.C. Cir. 1990). The appellants respond that these cases are inapplicable because the district court never made an explicit finding of misrepresentation, and thus they argue that Haberern's only possible cause of action under ERISA is promissory estoppel. Reply Brief at 8 n.8. (citing *Smith v. Hartford Ins. Group*, 6 F.3d 131, 141 (3d Cir. 1993)). We disagree with the appellants' contention that the only cause of action upon which Haberern could recover is promissory estoppel. We note that in *Smith*, we cited *Fischer v. Philadelphia Elect. Co.*, 994 F.2d 130, 133-34 (3d Cir.), *cert. denied*, 114 S.Ct. 622 (1993), in which we held an employer can be liable under ERISA in its fiduciary capacity both on breach of fiduciary duty and equitable estoppel theories for affirmative material misrepresentations. *See Smith*, 6 F.3d at 141 n.13.

However, we need not remand the matter to the district court for clarification because we agree with the appellants that Haberern may not recover damages for a breach of fiduciary duty under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B). The district court made it clear that section 502(a)(1)(B) is implicated because it noted that Haberern "brings this action pursuant to ERISA, 29 U.S.C.A. § 1132(a)(1)(B) (West 1985) to recover lost salary and benefits owed to her under the terms of the Plans and to enforce her rights under terms of the Plans." *Haberern*, 822 F. Supp. at 257.

Section 502(a) of ERISA provides in relevant part that a civil action may be brought:

> (1) by a participant or beneficiary -
>
> ...
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;
>
> (3) by a participant, beneficiary ... to obtain other appropriate equitable relief...

29 U.S.C. § 1132(a).

Section 409(a) of ERISA establishes liability for a fiduciary. The section provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

29 U.S.C. § 1109(a).

In *McMahon v. McDowell*, 794 F.2d 100 (3d Cir.), *cert. denied*, 479 U.S. 971, 107 S.Ct. 473 (1986), we interpreted section 409(a) in the context of section 502(a)(1)(B). In *McMahon*, the plaintiffs brought suit under section 502(a)(1)(B) and section 502(a)(2) to recover damages individually from plan fiduciaries for their failure to collect delinquent pension plan contributions, which failure the plaintiffs alleged was a breach of fiduciary duty. *McMahon*, 794 F.2d at 108.[5] We

[5] *McMahon* also involved other claims not germane here.

found the cause of action inappropriate under section 502(a)(1)(B), but allowed the suit to proceed under section 502(a)(2) so that the plaintiffs could recover damages "...for the benefit of the plan...." 794 F.2d at 109.

With respect to the cause of action under section 502(a)(1)(B), we noted that the plaintiffs characterized the claim as one brought to "recover benefits due to [them] under the terms of [their] plan, to enforce [their] rights under the terms of the plan, or to clarify [their] rights to future benefits under the terms of the plan." 794 F.2d at 109 (quoting section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B)). We noted that "actions brought under Section 502(a)(1)(B) are personal in nature and 'seek to declare the plaintiff beneficiary's rights under the plan, to recover benefits personally due him, or to enforce his personal rights.'" 794 F.2d at 109 (quoting *Livolsi v. R.A.M. Construction Company*, 728 F.2d 600, 602 (3d Cir. 1984)).

Additionally, we noted that in *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-42, 105 S.Ct. 3085, 3089-90 (1985), the Supreme Court held that section 409 of ERISA does not authorize a private right of action for compensatory relief. *McMahon*, 794 F.2d at 109. Noting the conflict between section 409, which establishes liability for an ERISA fiduciary but does not authorize a private right of action for compensatory damages, and section 502(a)(1)(B), which authorizes a private right of action for a beneficiary to enforce her own rights, we concluded that the plaintiffs could not proceed under section 502(a)(1)(B) in a suit to recover damages for a breach of fiduciary duty. *Id.*

This analysis applies here. The district court concluded that the appellants breached a fiduciary duty by making assurances to Haberern and then falling to inform her that those assurances were incorrect. *Haberern*, 822 F. Supp. at 261, 267. Although in this case the wrongdoing affected Haberern more directly than the wrongdoing affected

the plaintiffs in *McMahon*, we are unpersuaded that we should depart from *McMahon*'s holding that section 502(a)(1)(B) is unavailable in

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[6] In an opinion dated June 26, 1989, on a motion for summary judgment made by the appellants, the district court pointed out that Haberern stated that her claim with respect to the bonus was brought under section 502(a)(1)(B). 29 U.S.C. § 1132(a)(1)(B). App. at 140. The court made the same observation in its reported opinion. See *Haberern*, 822 F. Supp. at 257. Thus, we do not reach the question whether Haberern's misrepresentation argument could be upheld under section 502(a)(3), 29 U.S.C. § 1132(a)(3). See *Smith v. Hartford Ins. Group*, 6 F.3d at 137. We do note, however, that Haberern's misrepresentation argument has troubling implications because the summary plan description pages given to her made it clear that the retirement benefit was based on compensation and that compensation did not include bonuses. *See* app. at 167 (Haberern's testimony that she received her trial exhibit 1, the summary plan description, when the plan was put in place); app. at 279 (exhibit 1 includes a page indicating compensation means "salary or wages *excluding* bonuses) (emphasis in original document); app. at 281 (exhibit 1 includes a page indicating the retirement benefit is based on "compensation" subject to a cap). Of course, the summary plan description mirrored the plan itself. Thus, Haberern effectively is relying on parol evidence to contradict clearly defined terms of a plan revealed to her in writing. Accordingly, if we adopt her approach we will create a precedent for any beneficiary to make claims for benefits beyond those provided in a plan. It would be difficult to reconcile that result with our cases holding that oral or informal amendments to ERISA benefit plans are precluded. *See Confer v. Custom Eng'g Co.*, 952 F.2d 41.43 (3d Cir. 1991); *Frank v. Colt Indus., Inc.*, 910 F.2d 90, 98 (3d Cir. 1990). *See also Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034, 1040 (3d Cir. 1994) ("Unless and until the written plan is altered in a manner, and by a person or persons authorized in the plan, neither the plan administrator nor a court is free to deviate from the terms of the original plan.").

In this regard, we deem it significant that the district court found that Haberern's "duties as a secretary-bookkeeper involved handling the telephone, scheduling appointments, processing insurance claims forms, typing letters, receiving payments, bookkeeping, taking care of checkbooks, and paying all the bills." Furthermore, she kept an accounting of the contributions to the defined contribution plan. *Haberern* 822 F. Supp. at 252. Surely it would be extraordinary to hold that a person with such responsibilities who had possession of a summary plan description expressly indicating that her benefits would be based on her compensation *excluding* bonuses, contrary to the terms of the plan effectively could obtain a modification of the plan so that her benefits would be predicated on compensation *including* bonuses. However, in view of our disposition, we need not discuss this point further.

actions for breach of fiduciary duty.[6]

We also point out that insofar as we can ascertain the record does not support a finding that Haberern suffered damages by reason of the breach of fiduciary duty predicated on the alleged misrepresentation. In its opinion, the district court concluded that the appellants did not notify Haberern that designating a portion of her compensation as a bonus would have the effect of reducing her pension benefits." *Haberern*, 822 F. Supp. at 254. The court later explained that because the appellants "failed to inform [Haberern] that characterizing a portion of her compensation as a bonus would reduce significantly her pension benefits, they breached their fiduciary duties under ERISA." *Id.* at 261. But the court never explained what damages Haberern suffered by reason of the appellants' failure to give her this information. It did not suggest, for example, that Haberern had a veto power over the appellants' decision to divide her compensation between salary and bonus and, of course, she had no such power. Nor does it indicate that the evidence demonstrated that if Haberern had been aware of the significance of the designation of a portion of her compensation as a bonus, she would have resigned and obtained a different position paying higher compensation elsewhere.

Similarly, Haberern does not explain what damages she suffered by reason of appellants' alleged misrepresentation in not explaining the significance of the division of her compensation into salary and bonus. Brief at 28-30. Rather, she contends that the "'bonus' designation reduced [her] pension benefit." That observation, though undoubtedly correct, does not explain how Haberern suffered damages from the misrepresentation as distinguished from the design of the plan.

C. The Elimination of Haberern's Life Insurance Benefit and the Simultaneous Increase of the Doctors' Life Insurance Benefit

The district court found that the appellants' elimination of life insurance benefits in the defined benefit plan for beneficiaries over age

56, a change which affected only Haberern, and the simultaneous tripling of the face amount of the life insurance policies for Kaupp and McDonald, constituted a violation of section 510 of ERISA. The district court reached this conclusion after finding that the appellants' stated reason for the changes, that they wished to reduce costs, was "beyond belief in light of the increase in coverage for the doctors. *Haberern*, 822 F. Supp. at 262.

The appellants argue that section 510 does not apply because, while it prohibits discrimination against a plan participant for the purpose of interfering with the attainment of plan rights, it does not prohibit plan amendments which affect only one person. We agree. Section 510 of ERISA provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan ... or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan.
>
> ...

29 U.S.C. § 1140.

We have stated that Congress enacted section 510 primarily to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension benefits." *Gavalik v. Continental Can Co.*, 812 F.2d 834, 851 (3d Cir.) (quoting *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980)), *cert. denied*, 484 U.S. 979, 108 S.Ct. 495 (1987). *See also Ingersoll-Rand*, 498 U.S. at 143, 111 S.Ct. at 485 ("[b]y its terms § 510 protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting.... We have no doubt that his claim is prototypical of the kind Congress intended to cover under § 510.") (citations omitted). Section 510 makes it unlawful to "discharge, fine, suspend, expel, discipline, or discriminate...." 29 U.S.C. § 1140. The

only one of these terms capable of broad interpretation is "discriminate." But courts construing "discriminate" have concluded, consistently with our approach in *Gavalik*, that the term should be limited to actions affecting the employer-employee relationship, and we adhere to this construction.

McGath v. Auto-Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993), is helpful. In *McGath*, the employer hired the plaintiff, McGath, in July 1983. At that time it maintained an ERISA-qualified pension plan for its eligible employees. One of the requirements to qualify for the plan was the completion of one year of service. After completing one year of service, an employee would be admitted into the plan on the next entry date, either October 1 or April 1.

After McGath had completed one year of service, but before the next entry date into the plan, the employer became concerned that it would not survive financially subsequent to McGath's entry into the plan. To solve this problem, on September 30, 1984, the employer amended the plan to require three years of completed service. McGath continued to work for the employer. Two years later, on September 30, 1986, when McGath was one day short of becoming eligible under the plan, the employer amended it to limit eligibility to those eligible on September 30, 1986.

When McGath retired three years later, he unsuccessfully claimed benefits under the original plan. McGath filed suit alleging that the defendants had interfered with his attainment of pension benefits by deliberately discriminating against him in violation of ERISA section 510, 29 U.S.C. § 1140. The district court granted the defendants summary judgment. It concluded that section 510 protects only against actions intended to deny plan rights that affect the employment relationship. Because the amendments affected only the terms of the plan, and did not affect McGath's employment, there was no violation.

The court of appeals affirmed. It noted that it had previously determined that:

> the focus of § 510 is not on amendments to the plan itself. Rather we held that '[i]t is clear from the text of the statute ... that § 510 was designed to protect the employment relationship against actions designed to interfere with, or discriminate against, the attainment of a pension right.... Simply put, § 510 was designed to protect the employment relationship which gives rise to an individual's pension rights.... This means that a fundamental prerequisite to a § 510 action is an allegation that the employer-employee relationship, and not merely the pension plan, was changed in some discriminatory or wrongful way'

McGath, 7 F.3d at 668 (quoting *Deeming v. American Standard, Inc.*, 905 F.2d 1124, 1127 (7th Cir. 1990) (emphasis in original)). The court then concluded McGath did not have a cognizable section 510 claim. The court noted that McGath also alleged that the employer discriminated against him by bending the eligibility requirements for others. The court rejected the argument that there was a genuine issue of triable fact as to whether such discrimination took place, concluding:

> We need not address, however, this nettlesome issue because, even if Mr. McGath were able to show such disparate treatment, we do not believe that § 510 provides him any relief. Because the employer, as the settlor of the plan, had the right to change the plan's terms, Mr. McGath cannot claim that the alleged discriminatory injury flows from the plan amendments. ... ERISA § 510 affords protection from discrimination that interferes 'with the attainment of any right to which such participant may become entitled under the plan.' Mr. McGath does not have a *right* to treatment that is contrary to the terms of the plan, even if those terms are breached for others.

McGath, 7 F.3d at 670 (emphasis in original).

Other courts have reached similar results. See *West v. Butler*, 621 F.2d at 245-46 ("we conclude that discrimination, to violate § 510, must affect the individual's employment relationship in some substan-

tial way."); *Deeming v. American Standard, Inc.*, 905 F.2d at 1128 ("[s]ection 510 of ERISA is simply not the appropriate vehicle for redressing the unilateral elimination of severance benefits accomplished independently of employee termination or harassment."); *Owens v. Storehouse, Inc.*, 984 F.2d 394, 398 (11th Cir. 1993) ("[i]t is insufficient merely to allege discrimination in the apportionment of benefits under the terms of the plan"); *McGann v. H & H Music*, 946 F.2d 401, 408 (5th Cir. 1991), *cert. denied*, 113 S.Ct. 482 (1992) (section 510 does not apply to a plan limit on AIDS-related claims for all employees even if AIDS benefits singled out for discriminatory purpose). *But see Newton v. Van Otterloo*, 756 F. Supp. 1121, 1136 (N.D. Ind. 1991) ("[r]etaliatory curtailment of benefits under an ERISA plan may trigger § 1140"); *Vogel v. Independence Fed Sav. Bank*, 728 F. Supp. 1210, 1226 (D. Md. 1990).

Our analysis compels us to hold that the appellants' action in adopting the life insurance amendment is not actionable under section 510. If we held otherwise, our ruling would contradict the plain language of that section. Additionally, we would overlook the structure of ERISA which sets forth separate provisions for the protection of the employment relationship in section 510 and the protection of beneficiaries from discriminatory modifications of pension plans in section 240(g), 29 U.S.C. § 1054(g).[7]

D. The July 28, 1987 Letter

Lehigh Valley asserts that the district court erred in penalizing it for its alleged failure to provide Haberern with an explanation and accompanying calculations to demonstrate how it computed her benefits under the defined benefit plan. Section 105(a) of ERISA imposes an obligation on a plan administrator to:

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[7] The appellants also contend that Haberern suffered no loss from the elimination of her life insurance coverage, because if not eliminated "her life insurance policy simply would have been cashed out upon retirement, and that amount would have been used to fund [Haberems] monthly retirement benefit (or lump-sum equivalent) provided by the plan. Brief at 24. In view of our conclusion, we need not consider this argument.

> furnish to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information - (1) the total benefits accrued, and (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C. § 1025(a). An administrator who fails or refuses to comply with such a request within the court's discretion may be held personally liable to the requesting party for up to $100 for each day after the refusal. Thus, section 502(c)(1), 29 U.S.C. § 1132(c)(1), provides:

> Any administrator ... who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary ... by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal....

The district court, relying on a letter Haberern's attorney sent to the appellants' attorney, applied the foregoing two sections, found a violation, and awarded damages in the amount of $100 a day for a total of $191,300.

We set forth the two-page letter in full:

> Our firm has been retained by Mrs. Ruth Haberern. She is a Plan Participant in *both* the Defined Benefit Pension Plan and the Defined Contribution Plan. We understand your firm is counsel to Dr. McDonald, Trustee of these two plans.
>
> Several aspects of the administration of the two Plans, as pertinent to our client, are troublesome. For example, Mrs. Haberern officially retired on January 2, 1985. Yet, more than thirty (30) months transpired before Mrs. Haberern received a $42.986.24 check. This July 9 check, according to Dr. McDonald's accom-

panying letter, represented the 'total vested benefit due to you under the Kaupp Vascular Surgeons Defined Benefit Pension Plan'. However, there was no explanation, accompanying calculations, to support the amount of this July 9, 1987, check.

By letter dated April 27, 1987, Mrs. Haberern was advised by Dr. McDonald that the Defined Benefit Pension Plan was terminated effective August 31, 1984; yet, it took nearly three years for a disbursement to be made to Mrs. Haberern, a Plan Participant.

Mrs. Haberern has yet to receive her defined contribution pension plan check! She did receive annual reports concerning the plans.

Mrs. Haberern does not have, nor has she ever received, the full text of the defined contribution pension plan.

There are additional questions with regard to the administration of the two pension plans. We need to discuss these questions with you and the Administrator of the two plans.

I shall call your office on Friday, July 31, to secure a mutually convenient date for the requested meeting.

App. at 405-06 (emphasis in original). The district court concluded this letter was a request for an explanation of the calculation of Haberern's

[8] Haberern served a motion in this court after oral argument which she described as a "motion to correct the record." In particular, Haberern asked that we "correct the factual misstatement made by Appellants' counsel during oral argument" that Haberern never had made a written request for information in conformity with section 502(c). In her motion, Haberern contended that the statement was incorrect because a demand for an accounting, a document request, pleadings, and briefs, documents which she served within this litigation, constituted section 502(c) requests. We denied this motion, as the district court did not assess penalties by reason of the appellants' alleged failure to comply with these litigation documents. Thus, we have no reason to consider whether a demand within the context of litigation can be a request within sections 105(a) and 502(c)(1).

benefits which was not then provided to Haberern.[8]

We start our discussion on this issue by pointing out that statutory penalty provisions are construed strictly. See *Ivan Allen Co. v. United States*, 422 U.S. 617, 626, 95 S.Ct. 2501, 2506 (1975) (tax provision aimed at accumulated taxable income strictly construed). As might be expected, courts have taken this approach in applying penalty provisions of ERISA. *Tracey v. Heublein, Inc.*, 772 F. Supp. 726 (D. Conn. 1991) (requirements that request requirement of section 105(a) be in writing may not be waived); *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan*, 650 F. Supp. 359,370 (N.D. Ga. 1986) (corporation cannot be liable when request for information was never sent to it).

When the foregoing strict construction precept is recognized and the specific language of section 105(a) and 502(c), 29 U.S.C. §§ 1025(a) and 1132(c), is considered, it becomes evident that Haberern's attorney's letter cannot be regarded as a statutory request for an explanation of Haberern's benefits within those sections.[9] Haberern's attorney's letter requested only that a meeting be scheduled. While the letter complained that certain materials had not been supplied, it never requested that they be supplied. In these circumstances, we cannot understand how this letter could be construed as a written request under section 105(a), 29 U.S.C. § 1025(a).

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[9] We note that in light of the requirement that a request in writing be sent to the plan "administrator" as used in section 105(a), 29 U.S.C. § 1025(a), and as defined in section 3(16), 29 U.S.C. § 1002(16), it is questionable whether a request addressed to Lehigh Valley's attorney could have been an effective statutory request regardless of its form. In this case, the letter implicitly acknowledges that the recipient is not the administrator when it suggests discussing "these questions with you and the Administrator of the two plans." App. at 406. *See Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073, 1077 (5th Cir. 1990) (discussing whether life insurance company as agent to administer the plan should be regarded as *de facto* plan administrator). But because we find the letter was not a "request" within the meaning of section 1025(a), it is unnecessary to reach this issue.

We find support for our conclusion in *Fisher v. Metropolitan Life Ins. Co.*, 895 F.2d 1073 (5th Cir. 1990). In *Fisher*, the plaintiff had sent a handwritten scribbled note at the bottom of a social security award to the insurance company designated to administer the plan. The note requested, "a copy of the policies covering my contract for salary continuation." *Id.* at 1077. The court concluded this note was insufficient to constitute a request for plan documents. *Id. See also Chas. Kurz & Co. v. United States*, 698 F. Supp. 268 (Ct. Int'l Trade 1988) (petition for remission of excise duties was not a "request" for retroactive application of amended tariff statute). Further, the court in *Fisher* noted that the defendant responded to the scribbled note by suggesting that a copy of the policies "covering your contract" could be obtained from the plaintiffs previous employer. *Fisher*, 895 F.2d at 1077. This response led the court to believe that the defendant's understanding of the note was consistent with it not being a request for plan documents. Consequently, the court concluded it could not find the district court had abused its discretion in refusing to award penalties under section 502(c), 29 U.S.C. § 1132(c). We therefore will reverse the judgment of the district court imposing penalties on the appellants for failing to respond to the letter by supplying information regarding the calculation of Haberern's benefits.

IV. CONCLUSION

In view of our aforesaid discussion, we will reverse the judgment of May 13, 1993, in all respects, except that we will not reverse the district court's conclusion that the appellants breached their fiduciary duty by requiring Haberern to sign a release to obtain her benefits under the defined contribution plan. We will remand the matter to the district court for entry of a judgment in conformity with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN, Plaintiff v. KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE Defendants	:	CIVIL ACTION NO. 88-1853

ORDER

HUYETT, J. August 16, 1993

Upon consideration of Defendants' supplemental motion for amendment of judgment pursuant to Fed. R. Civ. P. 52(b), relief from judgment pursuant to Fed. R. Civ. P. 60(b), for judgment as a matter of law, and for a new trial pursuant to Fed. R. Civ. P. 59(a) (Document No. 84), Plaintiff's response, and because:

1. Plaintiff Ruth Haberern from 1974 to 1985 worked full-time as a secretary-bookkeeper for a professional corporation formerly known as Kaupp Vascular Surgeons, Ltd., and later known as Lehigh Valley Vascular Surgeons., Ltd. Defendants are the professional corporation, its defined benefit and defined contribution pension plans, and the pension plans' trustee. Plaintiff commenced this action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1993) to recover back salary and pension benefits that Defendants allegedly wrongfully withheld, as well

§§ 1001-1461 (West 1985 & Supp. 1993) to recover back salary and pension benefits that Defendants allegedly wrongfully withheld, as well as costs and attorney's fees. Following a nonjury trial, the Court made findings of fact and conclusions of law, provided a discussion of its reasons, and entered several judgments in favor of Plaintiff and against certain Defendants in the total amount of $614,165.99. Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan & Trust Agreement, 822 F. Supp. 247 (E.D. Pa. 1993).

2. Defendants move this Court to amend the findings of fact, discussion, conclusions of law and order and to enter judgments accordingly, or in the alternative, to order a new trial. Defendants assert three additional grounds in this supplemental motion.

3. First, Defendants argue that because the Court found as a fact that the Internal Revenue Service approved the amendment to the Defined Benefit Plan that eliminated the life insurance policy benefit, the plan amendment was lawful and hence cannot as a matter of law serve as a basis for a discrimination claim under section 510 of ERISA, 29 U.S.C.A. § 1140 (West 1985). Simply because the Court found that the IRS approved the amendment does prevent the Court from concluding that the amendment violated ERISA. The IRS letter related only to the status of the plan under the Internal Revenue Code. It was not a determination regarding the effect of other federal or local statutes. Def. Ex. 3. Defendants' first ground for relief lacks merit.

3. Second, Defendants contend that Plaintiff's claims in this action are based upon the theory of breach of fiduciary duty and that an individual who brings a breach of fiduciary claim is limited to seeking relief or recovery in favor of the benefit plan. Defendants raised this argument in their motion for summary judgment and the Court explained that Plaintiff properly brought her claims pursuant to 29 U.S.C.A. § 1132(a)(1)(B) (West 1985). See Memorandum and Order dated June 26, 1989. Defendants raised this argument again in their original trial memorandum and once again raise it in this motion. Once again, the Court rejects it.

4. Finally, Defendants claim that several of its actions,

which this Court found in violation of ERISA, were valid management decisions, as opposed to pension plan administration decisions, that might have some ancillary effect upon pension benefits, but which do not trigger claims under ERISA. Defendants assert that the decision to amend the defined benefit plan to eliminate the life insurance policy falls into this category. The Court rejects Defendants' claim for the reasons stated in the findings of fact, discussion, and conclusions of law. Defendants also contend that the decision to change Plaintiff's compensation arrangement by eliminating the receivables percentage was a management decision. Nazay v. Miller, 949 F.2d 1323 (3d Cir. 1991). For the reasons stated in the findings of fact, discussion, and conclusions of law, Defendant's decision violated the terms of the defined benefit plan and therefore violated ERISA.

Accordingly, Defendants' supplemental motion is DENIED in its entirety.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	NO. 88-1853
	:	
Defendants	:	

ORDER

HUYETT, J. August 16, 1993

Upon consideration of Defendants' motion for amendment of judgment pursuant to Fed. R. Civ. P. 52(b), relief from judgment pursuant to Fed. R. Civ. P. 60(b), for judgment as a matter of law, and for a new trial pursuant to Fed. R. Civ. P. 59(a) (Document No. 82), Plaintiff's response, and because:

1. Plaintiff Ruth Haberern from 1974 to 1985 worked full-time as a secretary-bookkeeper for a professional corporation formerly known as Kaupp Vascular Surgeons, Ltd., and later known as Lehigh Valley Vascular Surgeons., Ltd. Defendants are the professional corporation, its defined benefit and defined contribution pension plans, and the pension plans' trustee. Plaintiff commenced this action

under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1993) to recover back salary and pension benefits that Defendants allegedly wrongfully withheld, as well as costs and attorney's fees. Following a nonjury trial, the Court made findings of fact and conclusions of law, provided a discussion of its reasons, and entered several judgments in favor of Plaintiff and against certain Defendants in the total amount of $614,165.99. Haberern v. Kaupp Vascular Surgeons Ltd. Defined Benefit Plan & Trust Agreement, 822 F. Supp. 247 (E.D. Pa. 1993).

2. Defendants move this Court to amend the findings of fact, discussion, conclusions of law and order and to enter judgments accordingly, or in the alternative, to order a new trial. A court may amend its findings of fact or make additional findings and may amend the judgment accordingly upon motion of a party. Fed. R. Civ. P. 52(b). The primary purpose of Rule 52(b) is to ensure that the trial court's findings of fact and legal reasoning are clear, cover the essential factual and legal points, and will be understood by the appellate court, not to allow a party a second opportunity to prove its case. 9 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2582 (1971). "The purpose of motions to amend is to correct manifest errors of law or fact or, in some limited situations, to present newly discovered evidence . . . ." Kravco Co. v. Valley Forge Center Assoc., Civ. A. No. 91-4932, 1992 WL 5893, at *2 (E.D. Pa. Jan. 8, 1992) (quoting Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1219 (5th Cir. 1986)). A Rule 52(b) motion to amend should not "be employed to introduce evidence that was available at trial but was not proffered, to relitigate old issues, to advance new theories, or to secure a rehearing on the merits." Id. A court will not amend its findings or judgment where a party essentially requests the court to completely rewrite its findings and reverse its judgment. Erickson Tool Co. v. Balas Collet Co., 277 F. Supp. 226, 234 (N.D. Ohio 1967), aff'd, 404 F.2d 35 (6th Cir. 1968).

3. The Court has examined Defendants' motion and supporting memorandum of law and compared these documents to Defendants' pre- and post-trial findings of fact and conclusions of law and

supporting memoranda of law, and the arguments of counsel during trial. The comparison reveals that in their instant motion Defendants raise nearly all of the same issues and arguments that they raised previously.[1] Defendants essentially seek to relitigate all of the issues raised previously, and move the Court to rewrite its findings of fact, discussion, conclusions of law, and reverse its judgment accordingly. The Court considered with great care the pretrial proposed findings of fact and conclusions of law and memoranda of law, the evidence and arguments presented during the three-day trial, and the post-trial findings of fact and conclusions of law and memoranda of law of both sides. The Court issued clear and comprehensive findings of fact and conclusions of law. Defendants have failed to show that there are manifest errors of law or fact that need to be corrected.

4. A court may grant a new trial in a nonjury action "for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." Fed. R. Civ. P. 59(a)(2). "A motion for a new trial in a nonjury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2804 (1973). The Court has already considered the issues and arguments raised by Defendants in their motion for a new trial and has ruled.

5. A court may relieve a party from a final judgment for several reasons. See Fed. R. Civ. P. 60(b). Among those reasons are mistake, inadvertence, surprise, or excusable neglect. Fed. R. Civ. P. 60(b)(1). Defendants contend that this Court erred when it included paragraph 6 in its Order dated May 10, 1993. In the first five paragraphs of the Order, the Court entered judgment in favor of Plaintiff and against one or more Defendants for various sums. Paragraph 6 of the Order provides: "As set forth above, JUDGMENT IS ENTERED in favor of Plaintiff and against Defendants in the total amount of $614,165.99." Defendants believe that this paragraph directs that judg-

[1] Several times Defendants incorporate the arguments they made in the pre- and post-trial submissions into this motion and memorandum of law.

ment be entered in that amount against all Defendants, and therefore conclude that the Order results in an incorrect duplication of damages. The Court did not intend that judgment be entered in amount of $614,165.99 against all Defendants jointly and severally. Rather, it intended for judgment to be entered in various amounts against certain Defendants "as set forth above" in paragraphs 1 to 5 of the Order. There is no need to delete paragraph 6.

6. Under Rule 60(b)(6) a court may relieve a party from judgment for "any other reason." A court should relieve a party from judgment under Rule 60(b)(6) "whenever such action is appropriate to accomplish justice," but only in "extraordinary circumstances." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988). Defendants have failed to show any extraordinary circumstances that would justify relief under this rule.

7. One issue raised by Defendants merits a brief discussion. Defendants contend that the Court erred in making a determination on the attorneys fees issue. Defendants state that "it was stated that issue would be left to be determined at a later date, both from a factual and legal standpoint." Def. Mot. ¶ 3(kk). In oral argument following the close of the evidence, the Court permitted Plaintiff's counsel to address the merits of the issue whether Plaintiff was entitled to attorneys fees under 29 U.S.C.A. § 1132(g)(1) (West 1985). Transcript 11/25/92 at 72-75. When Defendants' counsel began to address the issue in his closing argument, however, the Court stated that it would consider counsel fees later, after it had determined the merits of the case. Id. at 101. Relying on those comments, Defendants did not address the issue of attorneys fees in their post-trial submissions. Nevertheless, the Court included a discussion of the issue of counsel fees on the merits in its findings of fact, discussion, and conclusions of law, see pp. 40-42, and concluded that Plaintiff, and not Defendants, were entitled to attorneys fees. Conclusion of Law No. 23. The Court relied on the trial record as well as the arguments of counsel in their respective pretrial memoranda of law. Defendants, however, contend that because of the comments of the Court to Defendants' counsel during closing argument, Defendants have not had a fair opportunity to argue the

merits of the issue of which party is entitled to counsel fees. Accordingly, Defendants shall file and serve, within two weeks from the entry of this order by the Clerk, a memorandum of law that addresses the merits of the attorneys fees issue. Plaintiff shall file and serve a response within two weeks of service. The Court shall hold in abeyance the affidavits submitted by Plaintiff that set forth the amounts of attorneys fees and expenses Plaintiff seeks and Defendants' response until the Court considers the memoranda of law submitted by the parties.

Accordingly, Defendants' motion for amendment of judgment pursuant to Fed. R. Civ. P. 52(b), relief from judgment pursuant to Fed. R. Civ. P. 60(b), for judgment as a matter of law, and for a new trial pursuant to Fed. R. Civ. P. 59(a) is DENIED IN PART and DENIED WITHOUT PREJUDICE IN PART. The motion is DENIED with respect to the grounds asserted in paragraph 2 and paragraph 3(a) to (s), 3(aa) to (jj) and 3(ll) to (ss). The motion is DENIED WITHOUT PREJUDICE with respect to the ground asserted in paragraph 3(kk)--the issue of attorneys fees.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. NO. 88-1853 DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	NO. 88-1853
	:	
Defendants	:	

FINDINGS OF FACT, DISCUSSION, AND CONCLUSIONS OF LAW

HUYETT, J. May 10, 1993

Plaintiff Ruth Haberern from 1974 to 1985 worked full-time as a secretary-bookkeeper for a professional corporation formerly known as Kaupp Vascular Surgeons, Ltd., and later known as Lehigh Valley Vascular Surgeons, Ltd. Defendants are the professional corporation, its defined benefit and defined contribution pension plans, and the trustee of those plans. Plaintiff commenced this action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001-1461 (West 1985 & Supp. 1992). Plaintiff seeks to recover back salary and pension benefits that Defendants have allegedly wrongfully withheld, as well as costs and attorney's fees. Following a nonjury trial, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

A. Identity of the Parties

Plaintiff Ruth Haberern is an adult individual who resides at 5677 Merion Lane, Macungie, Pennsylvania. (Plaintiff's Testimony, Transcript 11/23/92 at 10.) Kaupp Vascular Surgeons, Ltd. (later known as Lehigh Valley Vascular Surgeons, Ltd.) is a professional corporation that was incorporated on November 30, 1973. (Uncontested Statement of Facts dated September 11, 1990 ¶ 2.) The corporate name of Kaupp Vascular Surgeons, Ltd. was changed to Lehigh Valley Vascular Surgeons, Ltd. (Lehigh Valley) in November 1984. Defendant Lehigh Valley Vascular Surgeons, Ltd. Retirement Plan (the Defined Contribution Plan) and Defendant Kaupp Vascular Surgeons, Ltd. Defined Benefit Pension Plan and Trust Agreement (the Defined Benefit Plan), at all times relevant to this action were "employee pension benefit plans" and "pension plans," as defined in 29 U.S.C.A. § 1002(2) (West Supp. 1992) and governed by ERISA. The Defined Contribution Plan and the Defined Benefit Plan are separate entities from, and independent of, the employer that sponsors the Plans. (Uncontested Facts and Admissions dated November 23, 1992 and received into evidence as Court Exhibit 1 ¶ 2.) Defendant Lehigh Valley is, and was at all times relative to this action, the employer that sponsored the Defined Benefit and Defined Contribution Plans. Defendant Lehigh Valley was also the administrator of the Plans, as that term is defined under ERISA, 29 U.S.C.A. § 1002(16) (West Supp. 1992). (Ct. Ex. 1 ¶ 3.) The principal place of business of Defendant Lehigh Valley is 1275 South Cedar Crest Boulevard, Allentown, Lehigh County, Pennsylvania 18103. (Uncontested Statement of Facts dated September 11, 1990 ¶ 5.) Defendant Kenneth M. McDonald, M.D. (McDonald) is an adult individual who maintains a business address at Defendant Lehigh Valley. (Ct. Ex. 1 ¶ 5.) In 1976 McDonald became an employee of Lehigh Valley. (Pl. Test. Tr. 11/23/92 at 23.) McDonald served as a trustee of the Defined Contribution Plan from May 1, 1978 to the present, and as a trustee of the Defined Benefit Plan from its inception on September 1, 1979. (Ct. Ex. 1 ¶ 6.) McDonald is currently the trustee of the Defined Contribution Plan and, at all times relevant to this action, served as a trustee of the Defined Benefit Plan.

B. Plaintiff's Employment With Lehigh Valley

Plaintiff began working for Kaupp Vascular Surgeons, Ltd. on July 1, 1974. At that time the only employees of the corporation were Plaintiff and Harry A. Kaupp, M.D. Kaupp was the sole shareholder, director, and officer of the corporation. Plaintiff's duties as a secretary-bookkeeper involved handling the telephone, scheduling appointments, processing insurance claims forms, typing letters, receiving payments, bookkeeping, taking care of checkbooks, and paying all the bills. Plaintiff's duties with respect to the Defined Contribution Plan involved keeping an accounting of the contributions for each employee and where those contributions were deposited. When the number of employees of Kaupp Vascular Surgeons, Ltd. and later Lehigh Valley expanded beyond Plaintiff and Dr. Kaupp, Plaintiff continued to perform all the same duties that she had performed previously. (Uncontested Statement of Facts dated September 11, 1990 ¶¶ 8-10, 13-15.) Plaintiff worked for Defendant Lehigh Valley on a full-time basis until January 2, 1985. She worked on a part-time basis from January 3, 1985 until December 16, 1986. (Id. ¶ 8.)

To attract Plaintiff to work for him, Dr. Kaupp offered Plaintiff an annual salary of $11,500. (Pl. Test. Tr. 11/23/92 at 13.) As part of her compensation package, Dr. Kaupp offered to pay Plaintiff a percentage of the gross receipts of the corporation. The corporation also provided a defined contribution pension plan as well as health insurance for Plaintiff. (Pl. Test. Tr. 11/23/92 at 14; Kaupp Deposition at 112-113.) Plaintiff accepted these terms and began working for Dr. Kaupp. There was, however, no written employment contract. (Tr. 11/23/92 at 107.)

Plaintiff received biweekly salary checks as well as a check at the end of the corporation's fiscal year representing her percentage of the receivables collected by the corporation for the fiscal year. Plaintiff's salary as reported on her W-2 forms increased every year from 1975 to 1979. (Pl. Test. Tr. 11/23/92 at 15-18; Pl. Ex. 90.) Commencing September 1, 1979 Plaintiff's biweekly salary checks were increased from $561.80 to $601.20 up to and including August 30, 1984. Effec-

tive September 1, 1984, up to and including December 31, 1984, Plaintiff's biweekly salary checks were increased to $839.58. (Uncontested Statement of Facts dated September 11, 1990 ¶¶ 18, 19.)

Beginning in June 1984, Plaintiff gave frequent and repeated notices to Lehigh Valley that she intended to retire on August 31, 1984. Before August 31, 1984 Plaintiff postponed retirement date to January 2, 1985, and gave notice to Lehigh Valley. Lehigh Valley held a retirement dinner in Plaintiff a honor in October 1984. (Pl. Test. Tr. 11/23/92 at 30-35; Kaupp Dep. at 17-19.) Although Plaintiff retired on January 2, 1985 Dr. McDonald asked Plaintiff to work part-time thereafter and Plaintiff worked one day per week or less until December 16, 1986. (Pl. Test. Tr. 11/23/92 at 34.) During the period that Plaintiff worked for Lehigh Valley on a part-time basis, Lehigh Valley paid her biweekly and deducted taxes from her pay. Plaintiff received W-2 forms for 1985 and 1986 and the corporation covered her under its medical plan. (Uncontested Statement of Facts dated September 11, 1990 ¶¶ 20-22.)

C. The Defined Contribution Plan and the Defined Benefit Plan

Kaupp Vascular Surgeons, Ltd. established a pension plan, the Defined Contribution Plan, effective December 15, 1973. (Pl. Ex. 4.) The initial trustees of the Defined Contribution Plan were Dr. Kaupp and his wife, Barbara Kaupp. Plaintiff was a participant in the Plan from its effective date. (Pl. Test. Tr. 11/23/92 at 13.) Under section 4.1 of the Plan, Lehigh Valley agreed to contribute each year on behalf of each participant an amount equal to 20.5 percent of the first $10,800 of the participant's annual compensation plus 27.5 percent of compensation in excess of $10,800. (Pl. Ex. 4.) Section 7.3 of the Plan provides that participants may direct the investments of their contributions under the Plan. Plaintiff made this election in 1974. To the extent a participant has given specific directions, the Trustee is subject to these directions. Pursuant to section 5.1, the amounts contributed by the employer on behalf of a participant could be held in one or more accounts in a participant's name. These accounts would be credited

with investment earnings or losses. § 5.6. Plaintiff deposited the amounts Lehigh Valley contributed on her behalf into funds maintained for her benefit at Dean Witter Reynolds, Inc. (Dean Witter) and Gruntal & Co. (Gruntal). Plaintiff, consistent with the Plan, self-directed these accounts. (Pl. Ex. 4) Under section 6.8 of the Plan, an employee's share at any time is the amount in his or her account, subject to any vesting provisions of the Plan. At the time of her retirement, Plaintiff was fully vested in her Plan accounts. (Pl. Ex. 4; Ct. Ex. 1 ¶ 17.)

Effective September 1, 1979, Defendant McDonald and Dr. Kaupp, the two shareholders of Kaupp Vascular Surgeons, Ltd., established a defined benefit pension plan, Kaupp Vascular Surgeons, Ltd. Defined Benefit Plan and Trust Agreement (the Defined Benefit Plan). A defined benefit plan differs from a defined contribution plan in that there are no individual accounts in a defined benefit plan. Rather, a person's pension is based upon a formula taking into account factors such as age, compensation, and years of service. Thus, the employer guarantees a certain benefit based on a formula and benefits are paid out of a fund under the plan. (Pl. Ex. 2; John Lisicky Test. Tr. 11/23/92 at 126.)

Plaintiff was, at all times relevant, a participant in both plans, and, at the time of her retirement, Plaintiff was fully vested in both plans. (Pl. Test.; Ct. Ex. 1 ¶ 17.) Lehigh Valley was the sponsor and administrator of both plans. Lehigh Valley had the power to appoint trustees and to direct the trustees to make distributions of benefits. (Ct. Ex. 1 ¶¶ 2-4.) As fiduciaries of the Plans, McDonald and Lehigh Valley exercised authority and control in the management of the Plans. The fiduciary duties of McDonald and Lehigh Valley included responsibility for administering the Plans and distributing information, documents, and reports regarding the Plans, and for distribution of benefits. (Pl. Exs. 2 and 4 art. XI.) Defendant Lehigh Valley terminated the Defined Benefit Plan effective August 31, 1984 and the Internal Revenue Service approved the termination in December 1985. (Ct. Ex. 1 ¶¶ 16, 20.) Plaintiff was fully vested in the Plan on August 31, 1984. (Id. ¶ 17.)

D. Use of Plaintiff's Receivables Percentage to Fund Her Pensions

The contributions under the Defined Contribution Plan and the benefits under the Defined Benefit Plan were based upon the amount of a participant's total compensation and salary, respectively. (Pl. Exs. 2, 4.) For the fiscal years beginning July 1, 1975 and ending June 30, 1979, Plaintiff received as compensation, at the end of each fiscal year, a portion--approximately 80 percent--of a percentage (according to a formula) of the gross receipts of the corporation for that fiscal year. Lehigh Valley used the remaining 20 percent of that receivables percentage, that Plaintiff otherwise would have received, to fund Plaintiff's share of her Defined Contribution Plan. In effect, Plaintiff was forced to fund her own Defined Contribution Plan contribution. Section 4.1 of the Defined Contribution Plan states, however, that the employer is required to make the full contribution under the Plan. (Pl. Ex. 4; Pl. Test. Tr. 11/23/92 at 19-21.) Plaintiff had a copy of the summary plan description of the Defined Contribution Plan, which states that the employer makes the contributions to the Plan (Pl. Ex. 3) and told Dr. Kaupp that she should not have to fund her own pension. Nevertheless, Lehigh Valley used a portion of her receivables percentage to fund her contribution to the Defined Contribution Plan. (Pl. Test. Tr. 11/23/92 at 19.)

In 1980 Lehigh Valley eliminated the portion of Plaintiff's compensation that was calculated on the basis of Lehigh Valley's gross receipts thus reducing Plaintiff's compensation from $18,358 for the fiscal year ending June 30, 1979 to $14,429 for the fiscal year ending August 31, 1980. (Lehigh Valley had changed its fiscal year from July to June to September to August.) Based upon a salary of $19,000, Lehigh Valley would have to contribute approximately $10,000 on behalf of Plaintiff into the newly formed Defined Benefit Plan. The doctors felt that this amount was too much. (Lisicky Test. Tr. 11/23/92 at 128.) Therefore, they reduced her salary to $14,400, thus requiring Lehigh Valley to contribute only $5,500 to the Defined Benefit Plan. (Id. at 131.) By virtue of the elimination of her receivables percentage, Plaintiff was taking her salary and funding her Defined Benefit Plan. (Id.)

Drs. McDonald and Kaupp told Plaintiff that she would no longer receive annually the lump sum check based upon the corporation's gross receipts, and that this amount would be used by Defendants to fund her contribution to the new Defined Benefit Plan. They assured Plaintiff that the salary reduction was in her best interests because she would receive a monthly pension benefit equivalent to her full salary upon retirement. (Pl. Test. Tr. 11/23/92 at 21-24.) In 1980, when the doctors told Plaintiff that her compensation would be reduced and that the corporation was implementing the Defined Benefit Plan retroactive to September 1, 1979, Plaintiff was unhappy and expressed that unhappiness to Dr. Kaupp. (Id. at 23-24.)

Plaintiff's biweekly salary checks remained $601.20 from September 1, 1979 to August 31, 1984 (the period that the Defined Benefit Plan was in effect). Because the contributions to the Defined Contribution Plan and the benefits under the Defined Benefit Plan were based on salary, the reduction of her salary by virtue of the elimination of the receivables percentage reduced contributions to Plaintiff's account under the Defined Contribution Plan and reduced her benefits. The salary reduction also reduced her Defined Contribution Plan and Defined Benefit Plan pension benefits. (Lisicky Test.; Pl. Ex. 104.)

Lehigh Valley never told Plaintiff that the Defined Benefit Plan required the employer to make the contributions to the Plan. (Pl. Test. Tr. 11/23/92 at 27.) Lehigh Valley gave Plaintiff a copy of the summary plan description, but the pages regarding contributions to the Plan, insurance, and the table of contents were missing. These missing pages would inform Plaintiff that the employer was required to make the contributions to fund the Plan. (Pl. Test. Tr. 11/23/92 at 29-30; Pl. Ex. 1.) Plaintiff did not receive a complete summary plan description until 1987.

E. Designation of Compensation as Salary and Bonus

Effective for the year 1980, Lehigh Valley designated Plaintiff's compensation into two components: "salary" and "bonus." (Pl. Test.

Tr. 11/23/92 at 25-26.) Similarly, Lehigh Valley divided the compensation of Drs. Kaupp and McDonald into the same components. (Lisicky Test. Tr. 11/23/92 at 126-27.) Because benefits under the Defined Benefit Plan were based on salary excluding any bonus, this reduced the amount of the benefit under the Plan and thus the amount of money Lehigh Valley contributed to the Plan to fund the benefits. Plaintiff was not notified that designating a portion of her compensation as a bonus would have the effect of reducing her pension benefits. (Pl. Test. Tr. 11/23/92 at 101.)

F. Life Insurance

The Defined Benefit Plan provided for an additional benefit of life insurance for each participant equal to 30.58 times the participant's monthly retirement benefit. (Pl. Ex. 2 § 6.1.) On October 21, 1980 Lehigh Valley amended the Defined Benefit Plan to cancel the life insurance benefit for Plaintiff, while increasing the amount of life insurance for all other participants. (Id. amend. attached.) The reason given was to save money. (Leo Riley Test. Tr. 11/24/92 at 48.) The amendment, however, eliminated the life insurance benefit only for employees over age 56, and at the time of the amendment, Plaintiff was the only participant over 56. (Ct. Ex. 1 ¶ 15.) The amendment also more than tripled the amount of life insurance for all other participants, and provided insurance equal to 95.57 times the participant's monthly retirement benefit. Plaintiff never received notice of this amendment. On November 4, 1980 Lehigh Valley sent to the Internal Revenue Service a copy of the amendment to section 6.1 of the Defined Benefit Plan. (Def. Ex. 2.) On November 26, 1990 the Internal Revenue Service approved the amendment. (Def. Ex. 3.)

G. Pension Benefits Not Distributed to Plaintiff

Plaintiff was assured repeatedly by Defendant McDonald and others acting on his behalf that her pension benefits under both the Defined Contribution Plan and the Defined Benefit Plan would be distributed to her upon her retirement. (Pl. Test. Tr. 11/23/92 at 34.)

Beginning in June 1984, Plaintiff gave frequent and repeated notices to Lehigh Valley that she intended to retire on August 31, 1984. Before August 31, 1984, Plaintiff postponed her retirement date until January 2, 1985, and gave notice to Lehigh Valley. (Pl. Test. Tr. 11/23/92 at 31-35.) Although Plaintiff retired on January 2, 1985, Defendants did not distribute her benefits to her in 1985. Instead, they provided a series of excuses. (Pl. Test.) Defendants, however, in March 1985, paid $50,000 under the Defined Benefit Plan as a partial distribution to Dr. Kaupp pursuant to a request of his attorney. (Pl. Ex. 21; Edward H. Butz Test. Tr. 11/24/92 at 102-103.)

In April 1985 McDonald informed Plaintiff that Lehigh Valley could not distribute her pension benefits to her because of a "financial squeeze" on the corporation. (Pl. Ex. 19.) By May 15, 1985 McDonald had resolved the financial squeeze and fully funded the Plans. (McDonald Test. Tr. 11/24/92 at 157-161.) Nevertheless, Defendants failed to pay to Plaintiff her pension benefits. Instead, Mark Baicker, one of Lehigh Valley's pension advisers, advised Plaintiff in July 1985 that payment would not be made pending approval by the IRS of the termination of the Defined Benefit Plan and completion of some accounting matters relating to the Defined Contribution Plan. Baicker suggested to Plaintiff that she make a written request for payment of her pension benefits, but Plaintiff did not because she had made a written request for benefits in October 1984. (Def. Ex. 8; Pl. Test. Tr. 11/23/92 at 104-105.)

Although the IRS approved the termination of the Defined Benefit Plan in December 1985 (Def. Ex. 9), Defendants did not advise Plaintiff of the approval until February 1986, at which time they promised her, without condition or limitation, a full distribution from both the Defined Benefit and Defined Contribution Plans by the end of the month, which Defendants failed to do. (Pl. Ex. 25.) Instead, on July 18, 1986 Defendants required Plaintiff to sign releases as a condition of payment. Defendants requested and obtained signed releases from all other participants. (Def. Exs. 15, 18; Butz Test. Tr. 11/24/92

at 99-104, 112.) Defendants requested releases as a condition of distributions from both Plans because McDonald had become the sole trustee of both Plans and had not been involved in some of the earlier transactions and management of the Plans. (Butz Test. Tr. 11/24/92 at 100-101.) By letters of July 21, 1986 Defendants gave Plaintiff an accounting for both Plans. (Pl. Ex. 16; Def. Ex. 79.) Plaintiff refused to sign the releases and Defendants refused to pay any benefits to Plaintiff. (Pl. Test. Tr. 11/23/92 at 43-46; Butz Test. Tr. 11/24/92 at 135-36.)

In April 1987 Defendants informed Plaintiff that they would pay her benefits under the Defined Benefit Plan in the form of an annuity or a single sum payment and they asked Plaintiff to choose which she desired. Defendants again requested a release, which Plaintiff refused to sign. (Pl. Ex. 30.) In May 1987 Plaintiff requested distribution of both her Defined Benefit and Defined Contribution Plan benefits without execution of a release. (Pl. Ex. 31.) In July 1987 Defendants sent Plaintiff a check in the amount of $42,986.24, which they stated represented Plaintiff's complete entitlement under the Defined Benefit Plan. (Pl. Ex. 27.) Defendants did not request a release for the $42,986.24 payment because the Plan had been terminated with IRS approval. (Butz Test. Tr. 11/24/92 at 109-110.) On July 28, 1987 Plaintiff requested an explanation from Defendants of the basis of the $42,986.24 payment, (Pl. Ex. 110), but Defendants to date have not supplied an explanation.

Defendants have not paid Plaintiff her pension benefits under the Defined Contribution Plan. (Pl. Test. Tr. 11/23/92 at 53; McDonald Test.; Ct. Ex. 1 55 25, 26.) Defendants were prepared to distribute Plaintiff's benefits under the Plan in July or August of 1987 without a release, (Butz Test. Tr. 11/24/92 at 113-115), but Defendants declined to do so when Plaintiff's counsel delivered to counsel for Defendant McDonald Plaintiff's list of "demands" relative to both Plans. (Def. Ex. 25, 26.) Defendants again insisted on a release from Plaintiff. (Butz Test. Tr. 11/24/92 at 115-120.)

H. Defendants' Transfer of Plaintiff's Defined Contribution Plan Investments

Plaintiff deposited her Defined Contribution Plan monies into funds maintained for her benefit at Dean Witter and Gruntal. Plaintiff, consistent with the Plan, self-directed these accounts. (Pl. Ex. 4; Pl. Test. Tr. 11/23/92 at 14-15; Wally Rebar Test. Tr. 11/25/92 at 22-27.) In July 1987 Plaintiff's accounts with Gruntal consisted of approximately $27,000 of stocks and $36,000 in a money market account. Plaintiff also had two money market accounts with Dean Witter.

In October 1984, Plaintiff requested that, upon her retirement, Defendants distribute her pension benefits under both Plans "in kind." (Pl. Test. Tr. 11/23/92 at 47.) Under an in kind distribution, Plaintiff would receive the actual securities held. On May 22, 1987, however, Plaintiff requested that Lehigh Valley pay her benefits under both Plans as a "single sum" distribution for rollover into an Individual Retirement Account. (Pl. Ex. 31.) Plaintiff inadvertently made no reference in that letter to an in kind distribution. (Pl. Test. Tr. 11/23/92 at 91-92.) McDonald forwarded Plaintiff's letter to Lehigh Valley's pension advisors. They told McDonald to instruct Dean Witter and Gruntal to close Plaintiff's accounts under the Defined Contribution Plan and to send McDonald checks from the proceeds. (Pl. Ex. 62.) McDonald wrote to Dean Witter and telephoned Mr. Wally Rebar of Gruntal and directed them to sell Plaintiff's stocks and close her account. Rebar then telephoned Plaintiff who stated that she did not want her stock portfolio sold. Rebar then relayed Plaintiff's statement to McDonald. (Trans. 11/24/92 at 12-13.) Confronted with these conflicting instructions, McDonald telephoned his pension advisors who stated that the only way to provide Plaintiff with a lump sum distribution was to sell her stocks and pay her the proceeds. McDonald then telephoned Rebar and instructed him to sell Plaintiff's stocks. (Id. at 13.) The stocks were sold in July 1987 and although Plaintiff expressed her unhappiness, (Pl. Ex. 38.), she did not direct McDonald to buy back the stocks. (Pl. Test. Tr. 11/23/92 at 92-94.)

On July 22, 1987 Dean Witter and Gruntal issued three checks payable to Lehigh Valley for the benefit of Plaintiff. McDonald endorsed the checks over to Plaintiff. (Pl. Ex. 11.) Lehigh Valley was prepared to give those checks to Plaintiff, but when Plaintiff's counsel delivered a letter to Defendants' counsel on August 5, 1987 setting forth the losses that Plaintiff had allegedly incurred (Def. Exs. 25, 26), Lehigh Valley refused to give Plaintiff the checks until she signed a release. (Butz Test. Tr. 11/24/92 at 114-16.) McDonald then directed that the two checks from Dean Witter be deposited in a new money market account in the name of Lehigh Valley Vascular Surgeons, Ltd. Retirement Plan, Kenneth M. McDonald, Trustee and that the new account not show Plaintiff's name. (Pl. Ex. 10.) The Gruntal check was also placed in a money market account. (McDonald Test. Tr. 11/24/92 at 22.) McDonald chose a money market account because he believed that it was the safest investment mechanism. (Id. at 23.) Defendants refused to pay Plaintiff these funds without a release. (Def. Ex. 70; Pl. Test.; Ct. Ex. 1 ¶ 26.)

I. Administrative Fees

Section 11.3 of both Plans provides that "[a]ny reasonable expenses incurred in the administration of this Trust shall be chargeable to and paid by the Trust Fund; provided that the Employer may pay all or any part of such expenses, but shall have no obligation to do so." (Pl. Ex. 2, 4.) Defendants charged Plaintiff a total of $686.86 administrative fees for both plans for 1985 and 1986. (Def. Exs. 16, 79.) McDonald told plaintiff that she would not be charged administrative fees. Later, McDonald told Plaintiff that she would be charged administrative fees, but that he would reimburse Plaintiff in the form of a bonus. Plaintiff did not receive any reimbursement. (Pl. Test. Tr. 11/23/92 at 28.)

J. Damages

The amount, including prejudgment interest, of Plaintiff's lost salary used to fund the Defined Benefit Plan is $137,790. (Pl. Ex. 104; Lisicky testimony.)

The amount, including prejudgment interest, of Plaintiff's lost benefits under the Defined Contribution Plan as a result of the reduction of Plaintiff's salary is $37,892. (Id.)

The amount, including prejudgment interest, of Plaintiff's lost benefits under the Defined Benefit Plan as a result of the underfunding of the Plan because of the reduction of Plaintiff's salary is $62,072. (Id.)

The amount including prejudgment interest, of Plaintiff's Defined Contribution Plan distribution that she has never received is $142,145.99. (Pl. Ex. 108.)

The paid up value of the life insurance benefits under both Plans is $42,996.

Pursuant to 29 U.S.C. § 1132(c), $100 a day from August 27, 1987 (30 days after July 28, 1987) for Defendants' failure to provide an accounting of Plaintiff Defined Benefit Plan distribution.

II. Discussion

A. Standard of Review

Plaintiff brings this action pursuant to ERISA, 29 U.S.C.A. § 1132(a)(1)(B) (West 1985), to recover lost salary and benefits owed to her under the terms of the Plans and to enforce her rights under terms of the Plans. The standard of review for actions brought under section 1132(a)(l)(B) is a de novo standard "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 115 (1989). In the latter situation, the court should apply an arbitrary and capricious standard of review.

Defendants argue that the Court should apply the arbitrary and capricious standard of review. They point to the definition of fiduciary in both the Defined Contribution and Defined Benefit Plan as any per-

son who "exercises any discretionary authority or discretionary control respecting management of" the Plans. § 2.21 of both Plans. This language parallels the definition of fiduciary in ERISA itself. 29 U.S.C.A. § 1002(21)(A). In Firestone, however, the Court rejected Firestone's argument that as a matter of trust law interpretation of a benefit plan is an inherently discretionary function. Rather, under trust law the de novo standard is the nob. 489 U.S. at 112. The Court stated that ERISA contains much language regarding the discretionary function of trustees, but rejected Firestone's argument that the definition of fiduciary in ERISA mandated an arbitrary and capricious standard of review. Id. at 113-14.

Defendants also point to language in the Plans regarding the powers of the trustees to invest the funds, § 7.2, regarding the broad based powers of the trustees in general, § 11.5, and limiting the liability of the trustees for making investments or for losses to, or diminution of the trust funds. § 11.11. The language cited by Defendants, however, has nothing to do with determining eligibility for benefits or construing the terms of the Plans. Where federal courts have applied the arbitrary and capricious standard of review, the plans at issue have contained some explicit delegation of authority to the plan administrator to determine eligibility for benefits or to construe the plan terms. See, e.g., Block v. Pitney Bowes, Inc., 952 F.2d 1450, 1452-53 (D.C. Cir. 1992) (arbitrary and capricious standard applied where plan vests in administrative committee the power "to interpret and construe the Plan [and] to determine all questions of eligibility and status and rights of participants" and where committee decisions "shall, to the extent not inconsistent with the provisions of the Plan, be final and conclusive and binding upon all persons having an interest in the Plan."); Lowry v. Banker Life & Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir.), cert. denied, 110 S.Ct. 152 (1989) (arbitrary and capricious standard applied where plan document gave authority to the plan committee to (a) "interpret and construe" the Plan, (b) "to determine all questions of eligibility and status under the Plan," and (c) to "determine all questions arising in the administration of the Plan, including the power to determine the rights of eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests," and the plan documents provided that the committee's determinations were

binding on all persons subject to the claims procedures set forth in the plans.) There is no language in the Defined Contribution Plan or the Defined Benefit Plan here that is similar to the language of the plans in Block and Lowry. Because neither of the plans give the administrator or the trustee discretionary authority to determine Plaintiff's eligibility for benefits or to construe the terms of the plans, the Court will review Defendants' actions under a de novo standard of review.

B. Elimination of Plaintiff's Receivables Percentage

Plaintiff first claims that Defendant Lehigh Valley breached its fiduciary duties by using a portion (approximately 20 percent) of Plaintiff's receivables percentage to fund Plaintiff's Defined Contribution Plan benefits from 1975 to 1979, thereby forcing Plaintiff to make a portion of the contribution to the Plan, in violation of the Plan document that states that the employer makes the contributions to the trust fund. Defined Contribution Plan §§ 4.1, 4.2. Plaintiff next claims that Defendant Lehigh Valley breached its fiduciary duties by completely eliminating the receivables percentage in 1980, using this money to fund her Defined Benefit Plan, thus in effect forcing Plaintiff to make the contribution to the trust fund, in violation of the Plan document. Defined Benefit Plan art V.

Under ERISA, a fiduciary must discharge his duties in the interests of the participants and beneficiaries of the plan and in accordance with the documents and instruments governing the plan. 29 U.S.C.A. § 1104(a)(1)(D) (West Supp. 1992). Plaintiff claims that Defendants disregarded the documents governing the Plans by requiring Plaintiff to make the contributions to the Plans. Defendants contend that Plaintiff's claims are barred by ERISA's statute of limitations. Defendants also assert that because Plaintiff was an employee-at-will, Lehigh Valley had the right to reduce her compensation at any time.

> ERISA bars actions for breach of fiduciary duty
>
> after the earlier of (l) six years after . . . the date of the last action which constituted a part of the breach or violation, . . . or (2) three years after the earliest date on which the

> plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C.A. § 1113 (West Supp. 1992). Thus, the general rule is that a plaintiff must bring her action for breach of fiduciary duty within six years of the date of the last action that constituted a part of the breach. If the plaintiff had actual knowledge of the breach or violation, however, then the statue of limitations is three years. These two provision are negated, however, if the defendant engages in fraud or concealment. In the case of fraud or concealment, the plaintiff may bring her action within six years after she discovers the breach or violation. Brock v. Nellis, 809 F.2d 753, 754-55 (11th Cir.), cert. denied, 483 U.S. 1057 (1987). To apply section 1113, the Court must first determine the date of the last action which formed a part of the breach and then must determine the date of Plaintiff's actual knowledge of the breach. Gluck v. Unisys Corp., 960 F.2d 1168, 1178 (3d Cir. 1992).

With respect to Plaintiff's claim of being forced to contribute to the Defined Contribution Plan from 1975 to 1979 out of her receivables percentage, the date of the last action which formed a part of the breach or violation occurred in 1979, more than six years before Plaintiff commencedthis action on February 28, 1988. Therefore, her claim is barred by the statute of limitations unless Defendants engaged in fraud or concealment with respect this claim.

The Third Circuit has not addressed what constitutes fraud or concealment for the purpose of section 1113. The Seventh Circuit has stated that "[t]here must be actual concealment--i.e., 'some trick or contrivance intended to exclude suspicion and prevent inquiry.'" Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1095 (7th Cir. 1992) (quoting Wood v. Carpenter, 101 U.S. (11 Otto) 135, 143 (1879)). The Eighth Circuit has held that section 1113 "incorporates the 'fraudulent concealment doctrine,' which requires that plaintiffs show (1) that defendants engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that (2) they were not on actual or constructive notice of that evidence, despite (3) their exer-

cise of due diligence." Schaefer v. Arkansas Medical Society, 853 F.2d 1487, 1491-92 (8th Cir. 1988).

Defendants did not engage in fraud or concealment with respect to Plaintiff's claim regarding the Defined Contribution Plan from 1975 to 1979. Defendants provided Plaintiff with a complete copy of the summary plan description that stated that the employer makes the contributions to the Plan. Plaintiff was aware of this provision and was aware that a portion of the receivables percentage was used to fund her Plan.

With respect to Plaintiff's claim regarding the complete elimination of the receivables percentage and the use of that money to fund the Defined Benefit Plan, the Court must identify the date of the last action that constituted the breach of fiduciary duty. Defendants claim that one and only one action occurred--the elimination of the receivables percentage in 1980. Therefore, Defendants state that the six year statute of limitations expired in 1986, two years before Plaintiff filed her action. Defendant Lehigh Valley's elimination of Plaintiff's receivables bonus cannot be characterized as a one time reduction. Lehigh Valley eliminated Plaintiff's receivables bonus in 1980 dropping her salary from approximately $19,000 in fiscal year 1979 to approximately $14,400 in fiscal year 1980. From September 1, 1979 to August 31, 1984 Plaintiff's biweekly salary checks remained constant at $601.20. Lehigh Valley used this figure as Plaintiff's "salary" as defined in the Defined Benefit Plan to calculate the amount that it needed to contribute to the trust fund to fund Plaintiff's retirement benefit. Therefore, Plaintiff was in effect forced to fund her own Defined Benefit Plan from 1979 to 1984. Defendants Lehigh Valley engaged in a continuing violation of their fiduciary duties from 1979 to 1984, and therefore Plaintiff's claim is not time barred under the six year provision of section 1113.

Defendants contend that Plaintiff had actual knowledge of the breach of fiduciary duty in 1980 when Lehigh Valley informed her that they were eliminating her receivables percentage and using that money

to fund her benefit under the newly formed Defined Benefit Plan, and that therefore the three year provision of section 1113 applies and bars Plaintiff's claim. To prove that Plaintiff had actual knowledge of the breach of fiduciary duty or violation of ERISA, Defendants must prove that Plaintiff had "actual knowledge of all material facts necessary to understand that some claim exists, which facts could include necessary opinions of experts, . . . knowledge of a transaction's harmful consequences, . . . or even actual harm." Gluck v. Unisys, 960 F.2d 1168, 1177 (3d Cir. 1992). The Third Circuit, however, emphasized that their holding did "not mean that the statute of limitations can never begin to run until a plaintiff first consults with a lawyer." Id.

Plaintiff did have actual knowledge in 1980 that Lehigh Valley eliminated her receivables percentage, and suffered actual harm when her compensation was reduced. Gluck, however, requires not only that Plaintiff knew of the events that occurred which constitute the breach of fiduciary duty, but also knew that those events supported a claim of breach of fiduciary duty or violation under ERISA. International Union of Electronic, Electric, Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc., 980 F.2d 889, 900 (3d Cir. 1992). In that case, Murata provided notice to the plaintiffs in October 1985 that it had amended the pension plan, but the notice did not discuss the content of the amendment. The court held that the plaintiffs did not have actual knowledge of a potential breach of fiduciary claim in 1985. Id. at 901. Here, when Lehigh Valley implemented the Defined Benefit Plan in 1980, they provided Plaintiff with a summary plan description. That summary, however, was missing the pages that stated that the employer makes the full required contribution to the Plan on the employee's behalf. Plaintiff, therefore, did not have actual knowledge of all the material facts necessary to understand that she had a claim for breach of fiduciary duty or violation of ERISA in 1980. Defendants did not give Plaintiff a choice with respect to participating in the Defined Benefit Plan and never informed her that the employer, not the employee, was required to make the contributions to the Plan. Plaintiff did not know that the employer was required to make the contributions to the Defined Benefit Plan until 1987 when

she requested, and received, a copy of the complete Plan document itself. Plaintiff's claim with respect to the elimination of her receivables percentage and funding her own Defined Benefit Plan, therefore, is not barred by the statute of limitations.

Defendants argue that because Plaintiff was an employee at will Lehigh Valley was entitled to alter her terms and conditions of employment at any time. Plaintiff accepted the terms of her employment after the elimination of her receivables percentage by continuing to work for the corporation. Defendants contend that the monies used to fund the Defined Benefit Plan did not belong to Plaintiff because she had no legal right or entitlement to them.

In Pennsylvania, there is a presumption that the employment relationship is at will. Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974). Without a contractual provision to the contrary, either party can terminate that relationship for any reason or for no reason at any time. Veno v. Meredith, 515 A.2d 571, 577 (Pa. Super. 1986). Plaintiff bears the burden of overcoming the strong presumption of employment at will. Schoch v. First Fidelity Bancorporation, 912 F.2d 654, 600 (3d Cir. 1990). Here, there was no written employment agreement. Nevertheless, simply because Plaintiff's employment was at will does not entitle Lehigh Valley to violate ERISA. The Defined Benefit Plan required the employer to make the contributions to fund the pension benefits. Instead, Lehigh Valley reduced Plaintiff's salary by eliminating the receivables percentage in order to reduce the amount that it would have to contribute to fund her pension. In effect, Plaintiff funded her own pension benefit. Therefore, Defendants Lehigh Valley and McDonald breached their fiduciary duties by failing to act in accordance. with the terms of the Defined Benefit Plan.

Because the contributions to the Defined Contribution Plan and the benefits under the Defined Benefit Plan were based on salary, the reduction in Plaintiff's salary by virtue of the elimination of the receivables percentage reduced Lehigh Valley's contributions to Plaintiff's account under the Defined Contribution Plan and reduced her benefit

under the benefit formula under the Defined Benefit Plan. The salary reduction not only reduced Plaintiff's salary, but also reduced her Defined Contribution Plan and Defined Benefit Plan pension benefits. Defendants are liable to Plaintiff for the lost salary and pension benefits.

C. Designation of Plaintiff's Compensation as Salary vs. Bonus

The Defined Benefit Plan excluded bonuses from the definition of compensation used to calculate a participant's benefit under the Plan. § 2.10. From September 1, 1979 to August 31, 1984, the effective dates of the Plan, Plaintiff's salary used to calculate her benefit remained $14,428. Plaintiff did receive additional compensation during those fiscal years, designated as bonuses. Plaintiff states that because the condition of compensation excluded bonuses, this had the effect reducing her pension benefits and the amount of contribution Lehigh Valley to fund her benefits.

An employer does not violate ERISA simply by defining compensation to include certain items and to exclude others. Davidson v. Canteen Corp., 957 F.2d 1404, 1406 (7th Cir. 1992). In Davidson, the defendant established a retirement plan in 1985. The defendant amended the plan in 1986, without providing any notice to any participant, to exclude from the definition of compensation any income resulting from participation in the company's stock option plan. The change was made retroactive to January 1, 1986. The plaintiff is received oral notice of the change in October 1986. The plaintiffs received less benefits under the plan because of the change. The Court held that the defendants violated section 204(h) of ERISA, 29 U.S.C.A. § 1054(h) (West Supp. 1992) which prohibits amendments to a pension plan without notice to the participants in advance of when the amendments will take effect. The court stated that "[i]t is not wrong for an employer to exclude the income from exercising stock options from the calculation of pension benefits. But to do [so] without adequate notice, after assuring its employees that such income will count toward their pensions, will, in almost all cases, reduce, and reduce significantly, those employees' pension benefits. Such a change violates § 204(h)." Id.

In this case, Lehigh Valley established the Defined Benefit Plan in 1980, effective September 1, 1979, which excluded bonuses from the definition of compensation. Lehigh Valley did not amend an existing plan. Therefore, section 204(h) does not apply. Nevertheless, when Lehigh Valley established the Plan, they assured Plaintiff that she would receive a pension benefit equal to her salary upon retirement. Because Defendants Lehigh Valley and McDonald failed to inform Plaintiff that characterizing a portion of her compensation as a bonus would reduce significantly her pension benefits, they breached their fiduciary duties under ERISA.

D. Elimination of Plaintiff's Life Insurance Policy

Section 510 of ERISA provides, in pertinent part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . .

29 U.S.C.A. § 1140 (West 1985). Congress enacted this provision to protect an employment relationship that gives rise to an individual's rights under an employment benefit plan. The legislative history of this provision reveals that Congress enacted section 510 "primarily to prevent unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." Gavalik v. Continental Can Co., 812 F.2d 834, 851 (3d Cir.), cert. denied, 484 U.S. 979 (1987).

To recover under section 510, a plaintiff must prove that the defendant had the specific intent to engage in proscribed activity. Id. As in the case of employment discrimination actions under Title VII of the Civil Rights Act of 1964, a plaintiff alleging discrimination under ERISA bears the burden of establishing a prima facie case of discrimination. To establish a prima facie case of discrimination under section

510 of ERISA, "an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." Id. at 852. Once the plaintiff establishes a prima facie case of discrimination, the burden shifts to the employer to introduce admissible evidence of a legitimate, nondiscriminatory reason for its challenged actions. Id. at 853. If the employer carries this burden of production, the employee must demonstrate that the employer's articulated reason is pretextual. Id.

Plaintiff has established that Lehigh Valley amended the Defined Benefit Plan to eliminate the life insurance benefit for those participants over age 56. At the time of the amendment, Plaintiff was the only participant over age 56 and, therefore, the only person whose benefit was eliminated. Lehigh Valley stated that it amended the plan to save money. While the mere elimination of pension benefits to save money does not, in and of itself, constitute a violation of section 510, the particular facts and circumstances in this case lead to the conclusion that Defendants Lehigh Valley and McDonald violated that provision. Doctors Kaupp and McDonald amended the life insurance benefit to triple the face amount of the policy from 30.58 times the monthly pension benefit to 95.57 times the monthly pension benefit. This renders the employer's stated reason for the elimination of the benefit for employees over age 56--to save money--unworthy of belief. Furthermore, the doctors chose an age cut-off of 56, just one year below Plaintiff's age at the time of the amendment, while making sure that they would not be affected by the amendment. Thus, Defendants Lehigh Valley and McDonald had the specific intent of interfering with Plaintiff's attainment of a life insurance policy under the Defined Benefit Plan when they amended the Plan in October 1980.

E. The Delay in Paying Plaintiff Benefits

Plaintiff contends that Defendants Lehigh Valley and McDonald breached their fiduciary duties under section 1104(a) (l)(D) by failing to distribute Plaintiff's pension benefits to her in a timely manner pursuant to the Plans.

Under the Defined Contribution Plan the normal retirement date is the anniversary of participation nearest to a participant's sixty-fifth birthday. Pl. Ex. 4 § 2.14. The Plan allows an employee to elect to retire within five years of her normal retirement date (early retirement). § 6.5. The Plan provides that the normal retirement benefit payable to a participant "commencing on any retirement date," shall be a qualified joint and survivor annuity, § 6.1, but "[a] Participant may elect to take a form of distribution other than that described in Section 6.1 upon his normal, early or late retirement." § 6.11. Plaintiff elected to take an early retirement by written notice to Lehigh Valley in October 1984 and also requested that her benefits be distributed to her on January 3, 1985. Plaintiff was eligible to take an early retirement because she was within five years of age sixty-five at the time.[1] Plaintiff retired on January 2, 1985, even though she worked one day per week or less for Lehigh Valley until December 16, 1986, and therefore she was entitled to receive her benefits.

In April 1985, Dr. McDonald informed Plaintiff that a financial squeeze on Lehigh Valley prevented the corporate contribution to the Plan. In July 1985 Lehigh Valley's pension advisors informed Plaintiff that they were attempting to clarify some accounting matters relating to the Plan. In February 1986 the attorney for Dr. McDonald informed Plaintiff that the annual accounting and reporting requirements for the year ending August 1985 had to be completed before distribution of her Defined Contribution Plan benefits and this would be done by late February. Finally, on July 18, 1986 Lehigh Valley informed Plaintiff that it was prepared to distribute benefits to her, but first she must execute a release. The release provided that in consideration for payment to Plaintiff of the amount of her Defined Contribution Plan benefit, Plaintiff would release the Defined Contribution Plan, Lehigh Valley, the Plan administrator, the Plan trustee, and all other Plan fiduciaries from all claims past, present, and future for any cause in connection with the Plan. Pl. Ex. 37. Defendants modified the language of the release in November 1987 to provide: "This release shall not extend to or affect any rights, claims or causes of action I may

[1] Although the record before the Court does not provide Plaintiff's date of birth, the parties' submissions state that Plaintiff turned age sixty-five in 1987.

have against the parties listed above for payment of my accrued, vested benefits as defined in and payable to me according to the terms of the Plan." Def. Ex. 70. Plaintiff claimed that nothing in the Plan nor ERISA requires the execution of a release as a prerequisite for obtaining pension benefits and that the Plan's and McDonald's attempt to obtain a release from liability to Plaintiff violates section 410(a) of ERISA, 29 U.S.C.A. § 1110(a) (West 1985).

Courts have held that a fiduciary's imposition of conditions not contained in a plan's language is arbitrary and capricious and a violation of ERISA. Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); accord Dennard v. Richards Group, Inc., 681 F.2d 306, 318 (5th Cir. 1982); Morgan v. Mullins, 643 F.2d 1320, 1321 (8th Cir. 1981). These cases did not involve releases. Nevertheless, nothing in the Defined Contribution Plan or ERISA states that Plaintiff is required to execute a release to receive a distribution of her pension benefits. Conditioning the distribution of Plaintiff's benefits upon the execution of a release under the circumstances of this case violates Defendants' fiduciary duties.

In addition, the release would be unenforceable under section 410(a) of ERISA, which provides, in part, that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under (the fiduciary responsibility sections] shall be void as against public policy." 29 U.S.C.A. § 1110(a) (West 1985). The Third Circuit has not addressed the issue of whether this section prohibits the release of a fiduciary from past, present, and future claims relating to the administration of an ERISA plan. The Court concludes that releases are instruments or agreements within the meaning of section 1110(a) and that Defendants violated ERISA by conditioning the distribution of benefits to Plaintiff on her execution of a release, and thus Defendants failed to pay Plaintiff benefits to which she was entitled in a timely manner.

With respect to Plaintiff's Defined Benefit Plan benefits, Plaintiff did not qualify for early retirement under the terms of that Plan. The

Plan required the participant to attain age sixty and complete sixteen years of service to be eligible for early retirement. § 4.3. Plaintiff had not completed sixteen years of service on January 2, 1985. Lehigh Valley, however, terminated the Defined Benefit Plan pursuant to section 9.2 of the Plan and terminated the Plan's trust fund pursuant to section 9.3 which required distribution of Plaintiff's benefits. In July 1986 Lehigh Valley, however, required Plaintiff to execute a release as a condition of receiving her benefits. Pl. Ex. 36. This violated ERISA because it imposed a condition on the receipt of benefits not contained in the Plan.

G. Administrative Fees

Section 11.3 of the both Plans provides that "[a]ny reasonable expenses incurred in the administration of this Trust shall be chargeable to and paid by the Trust Fund; provided that the Employer may pay all or any part of such expenses, but shall have no obligation to do so." Pl. Ex. 2, Pl. Ex. 4 § 11.3. McDonald told Plaintiff that she would not be charged administrative fees. Later, McDonald told Plaintiff that she would be charged administrative fees, but that he would reimburse Plaintiff in the form of a bonus. Plaintiff did not receive any reimbursement.

Section 403(c) of ERISA provides that the assets of a plan "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C.A. § 1103(c)(1) (West Supp. 1992). Plaintiff has failed to prove that the administrative fees that Lehigh Valley deducted from Plaintiff's accounts under the Plans for 1984 and 1985 were unreasonable, inappropriate, or discriminatorily imposed. Dr. McDonald's promises that the employer would pay administrative fees are unenforceable oral modificationS to the terms of the Plans. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1163 (3d Cir. 1990).

H. Failure to Provide an "Accounting"

ERISA provides that a court may hold an administrator liable to a plan participant in the amount of up to $100 per day from the date of an administrator's failure or refusal to comply with a plan participant's request for information that an administrator is required to provide according to the statute. 29 U.S.C.A. § 1132(c)(1)(B) (West Supp. 1992). On July 28, 1987 Plaintiff's attorney wrote to the attorney for Defendants seeking, among other things, an explanation and accompanying calculations to support the amount of the July 9, 1987 check to Plaintiff in the amount of $42,986.24 which represented Plaintiff's benefits under the Defined Benefit Plan. Pl. Ex. 110. Lehigh Valley to date has not provided plaintiff with the explanation that she sought.

Section 105 of ERISA obligates the administrator of an employee pension benefit plan to furnish

> to any plan participant or beneficiary who so requests in writing, a statement indicating, on the basis of the latest available information--
>
> (1) the total benefits accrued, and
>
> (2) the nonforfeitable pension benefits, if any, which have accrued, or the earliest date on which benefits will become nonforfeitable.

29 U.S.C.A. § 1025(a) (West 1985). Lehigh Valley contends that it complied with this provision, even before Plaintiff made a written request, because the cover letter that accompanied the check states that the $42,986.24 "represents the total vested benefits" due to Plaintiff under the Defined Benefit Plan. Pl. Ex. 27. With respect to section 1025(a), the Third Circuit has stated:

> If a participant or beneficiary who has a pressing need for an accounting at a significant time, such as upon termination of employment, disability, or vesting, is unable to receive it upon a request, his or her financial planning would be impaired and his or her effort to

> enforce the rights and fiduciary obligations imposed by ERISA would be severely hampered . . . . The legislative history shows that the drafters of ERISA believed that individualized reporting and disclosure would play an important role in effectuating ERISA's goals. The accounting provision, which is broadly applicable, must be construed so as to protect the employees' interests.

Barrowclough v. Kidder Peabody & Co., 752 F.2d 923, 933-34 (3d Cir. 1985) (citations omitted). While section 1025(a) states only that an administrator must provide a statement stating the total benefits accrued, this provision should be interpreted broadly to accommodate a plan participant's request that the administrator provide the computations to support the amount stated.

Lehigh Valley contends that Plaintiff was no longer a plan participant in July 1987 when she made the request for an accounting. The Supreme Court has stated, however, that the term plan participant includes former employees who have a reasonable expectation of returning to covered employment or who have a colorable claim to vested benefits. Firestone Tire & Rubber Co. Bruch, 489 U.S. 101, 117 (1989). Plaintiff had a colorable claim for vested benefits under the Defined Benefit Plan when she made her request.

Lehigh Valley claims that Plaintiff has failed to demonstrate any prejudice from failing to receive the requested information. The Third Circuit has not held that a participant must show prejudice to receive damages awardable under section 1132(c). Rather, the Third Circuit has emphasized the importance of responding to information requests "to enable claimants to make their own decisions on how best to enforce their rights." Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 153 (3d Cir. 1987), aff'd in part, rev'd in part, 489 U.S. 101 (1989). In deciding whether to award damages under section 1132(c), a court should consider whether or not the employer demonstrated bad faith in responding to the request. Id.; Kann v. Keystone Resources,

Inc., 575 F. Supp. 1084, 1094 (W.D. Pa. 1983). Lehigh Valley has never provided Plaintiff with an explanation of how it computed the amount of Plaintiff's Defined Benefit Plan benefits. The Court will award Plaintiff damages in the amount of $100 per day.

I. Prejudgment Interest

Plaintiff requests that the Court award prejudgment interest on the amount of her lost salary and benefits and on the amount of her Defined Contribution Plan benefits withheld from her since 1987. The Supreme Court has held that "[p]rejudgment interest is an element of complete compensation." West Virginia v. United States, 479 U.S. 305, 310-11 (1987). Although ERISA does not provide specifically for prejudgment interest, the Third Circuit has stated that a court, in its discretion, may award prejudgment interest for a denial of pension benefits. Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1010 (3d Cir. 1992). In the present case it is appropriate to award prejudgment interest to Plaintiff in order to make her whole. Defendants decreased her salary beginning in 1980 in order to fund her interest in the Defined Benefit Plan. Furthermore, Defendants have denied Plaintiff benefits under the Defined Contribution Plan since 1987. Prejudgment interest will make Plaintiff whole for the time that she was denied the use of the money legally due. The appropriate rate for prejudgment interest in ERISA cases is the rate for postjudgment interest set forth in 28 U.S.C. § 1961. See Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir.), cert. denied, 454 U.S. 968 (1981); Kay v. Thrift and Profit Sharing Plan, 780 F. Supp. 1447, 1462 (E.D. Pa. 1991). Thus, sums which Defendants deprived Plaintiff in the years 1980, 1981, and 1982 (prior to the statute's effective date) earn 6 percent interest; sums which Defendants deprived Plaintiff as of August 31, 1983 earn 10.74 percent; and sums which Defendants deprived Plaintiff as of August 31, 1984 earn 11.98 percent. These rates will be applied to Plaintiff's claim for lost salary and benefits. Pl. Ex. 104. Finally, the Court will award Plaintiff prejudgment interest in the amount of 6.96 percent on the amount of her Defined Contribution Plan benefits that Plaintiff has never received. Pl. Ex. 108.

J. Attorneys Fees

Both Plaintiff and Defendants have requested attorneys fees and costs. ERISA provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party," 29 U.S.C.A. § 1132(g)(1) (West 1985), but does not automatically mandate an award to a prevailing party. Monkelis v. Mobay Chemical, 827 F.2d 935, 937 (3d Cir. 1987). The factors that a court must consider in determining whether to make an award of attorneys fees under ERISA include:

(1) the offending parties' culpability or bad faith;
(2) the ability of the offending parties to satisfy an award of attorneys' fees;
(3) the deterrent effect of an award of attorneys' against the offending parties;
(4) the benefit conferred on members of the pension plan as a whole; and
(5) the relative merits of the parties' position.

Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983).

First, Defendants' culpability supports an award of attorneys fees to Plaintiff. Lehigh Valley reduced Plaintiff's salary, used that money to fund her pension in direct violation of Plan documents, and omitted important pages from a summary plan description. It passed a discriminatory amendment to the Defined Benefit Plan that tripled the face value of all participants' life insurance policies, while totally eliminating Plaintiff. Lehigh Valley should have paid Plaintiff her pension benefits in 1985, but instead delayed payment until 1987 and to date has not paid Plaintiff her Defined Contribution Plan benefits more than eight years after her retirement.

Second, Defendant Lehigh Valley is a successful medical practice and has the financial ability to satisfy an award of attorneys fees. Third, an award of attorneys fees will serve as a deterrent against Lehigh Valley from acting in violation of ERISA in the future. The

fourth factor is not relevant under the facts of this case. Finally, Plaintiff has prevailed on the merits on most of her claims. An award of attorneys fees and expenses is appropriate under the facts and circumstances of this case.

Defendants ask the Court to award them attorneys fees because the Court granted summary judgment to Defendants on several issues. The Court struck Plaintiff's jury trial demand, held that ERISA preempted Plaintiff's conversion claim, granted summary judgment on some of Plaintiff's discrimination claims, and dismissed Plaintiff's claims for lost profits and punitive damages. Plaintiff did not bring these claims in bad faith. While she would be able to satisfy an award of attorneys fees, and an award would deter others from asserting claims that lacked merit, the relative merits of the parties' positions in this litigation does not support an award of attorneys fees to Defendants. Plaintiff has prevailed on her core claims at trial and has achieved a significant amount of the relief that she sought. Under all of these circumstances, Plaintiff, not Defendants, is entitled to an award of attorneys fees.

III. Conclusions of Law

1. This Court has jurisdiction over the subject matter pursuant to ERISA, 29 U.S.C.A. § 1132(e)(1), (f) (West 1985) and the parties. Venue is proper in this district. § 1132(e)(2).

2. Lehigh Valley's Defined Contribution Plan and Defined Benefit Plan were both, at all times relevant to this action, "employee pension benefit plans" and "pension plans" as defined in ERISA, 29 U.S.C.A. § 1002(2) (West Supp. 1992). Defendant Lehigh Valley was the administrator of the Plans as defined in section 1002(16).

3. Defendants McDonald and Lehigh Valley were and are fiduciaries with respect to the Defined Contribution Plan and the Defined Benefit Plan, pursuant to ERISA, 29 U.S.C.A. § 1002(21)(A) (West Supp. 1992) and 29 C.F.R. Part 2510.

4. Defendants McDonald and Lehigh Valley, as fiduciaries of the Plans, exercised authority and control respecting management of the Plans.

5. Defendants McDonald and Lehigh Valley, as fiduciaries with respect to the Plans, owed Defined Contribution and Defined Benefit Plan participants and beneficiaries, including Plaintiff, the duty of discharging in good faith their duties with respect to the Plans solely in the interests of the participants and the beneficiaries for the purpose of providing the participants and beneficiaries with benefits in accordance with the documents and instruments governing the Plans. ERISA, 29 U.S.C.A. § 1104(a) (West 1985 & Supp. 1992).

6. Plaintiff retired from Lehigh Valley on January 2, 1985.

7. Plaintiff has proven by a fair preponderance of the evidence that Defendants have violated her rights under ERISA and the Plans.

8. Plaintiff has proven by a fair preponderance of the evidence that she is entitled to recover benefits due her under the terms of the Defined Contribution Plan and the Defined Benefit Plan. 29 U.S.C.A. § 1132(a)(1)(B) (West 1985).

9. Plaintiff has proven by a fair preponderance of the evidence that Defendants Lehigh Valley and McDonald have breached their fiduciary duties and violated Plaintiff's rights under ERISA by failing to distribute the benefits due her under the terms of the Plans within the times prescribed by the Plans' instruments.

10. Plaintiff has proven by a fair preponderance of the evidence that Defendants Lehigh Valley and McDonald have breached their fiduciary duties and violated Plaintiff's rights under ERISA by delaying the distribution of Plaintiff's benefits due her under the terms of the Plans and the surrounding circumstances by demanding the execution of releases in return for the payment of these sums.

11. Plaintiff's claim that Defendant Lehigh Valley breached its fiduciary duties and violated the terms of the Defined Contribution

Plan by taking a portion of Plaintiff's compensation (the receivables percentage) and using it to fund the Defined Contribution Plan, thereby forcing her to fund the Plan from 1975 to 1979 is barred by the applicable statute of limitations.

12. Plaintiff has proven by a fair preponderance of the evidence that Defendant Lehigh Valley has breached its fiduciary duties and violated the terms of the Defined Benefit Plan by eliminating a portion of Plaintiff's compensation (the receivables percentage) and using it to fund the Defined Benefit Plan, thereby forcing her to fund the Plan.

13. Plaintiff has proven by a fair preponderance of the evidence that Defendant Lehigh Valley has violated section 510 of ERISA, 29 U.S.C.A. § 1140 (West 1985) by discriminatorily amending the Defined Benefit Plan to provide an insurance benefit for all Plan participants except Plaintiff and canceling Plaintiff's Defined Benefit Plan life insurance benefits.

14. Defendants did not violate ERISA by deducting administrative fees from Plaintiff's accounts.

15. Plaintiff has proven by a fair preponderance of the evidence that Defendant Lehigh Valley violated ERISA, 29 U.S.C.A. § 1021(a)(1) by failing to furnish to Plaintiff a complete summary plan description of the Defined Benefit Plan and violated section 1025(a) by failing to provide a statement that shows how Lehigh Valley computed Plaintiff's Defined Benefit Plan distribution.

16. Plaintiff has proven by a fair preponderance of the evidence that Defendants Lehigh Valley and McDonald have breached their fiduciary duty and violated plaintiff's rights under ERISA by designating as a "bonus" a portion of Plaintiff's compensation thus reducing plaintiff's benefits under the Defined Benefit Plan.

17. Defendants Lehigh Valley and McDonald are liable to Plaintiff for $137,790 for her lost salary that was used to fund the Defined Benefit Plan.

18. Defendants Defined Contribution Plan, Lehigh Valley, and McDonald are liable to Plaintiff for $37,892 for her lost benefits under the Defined Contribution Plan as a result of the underfunding of the Defined Contribution Plan because of the reduction of Plaintiff's salary.

19. Defendants Defined Benefit Plan, Lehigh Valley and McDonald are liable to Plaintiff for $62,072 for her lost benefits under the Defined Benefit Plan as a result of the underfunding of the Defined Benefit Plan because of the reduction of Plaintiff's salary and the characterization of a portion of her compensation as a bonus.

20. Defendants Defined Contribution Plan, Lehigh Valley, and McDonald are liable to Plaintiff for $142,145.99 for the Defined Contribution Plan distribution that she has never received.

21. Defendants are liable to Plaintiff for $42,996 for life insurance coverage under both Plans.

22. Pursuant to ERISA, 29 U.S.C.A. § 1132(c) (West Supp. 1992), Defendant Lehigh Valley is liable to Plaintiff for a $191,300 representing $100 per day from August 27, 1987 (30 days after Plaintiff's request on July 28, 1987) for failure to provide a statement that shows how Defendants computed Plaintiff's Defined Benefit Plan distribution.

23. Pursuant to ERISA, 29 U.S.C.A. § 1132(g)(1) (West 1985), Plaintiff is entitled to her attorneys' fees and costs.

An appropriate order follows:

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	NO. 88-1853
	:	
Defendants	:	

ORDER

HUYETT, J. May 10, 1993

In consideration of the foregoing findings of fact, discussion, and conclusions of law:

1. JUDGMENT IS ENTERED in favor of Plaintiff and against Defendants Kaupp Vascular Surgeons, Ltd. Defined Benefit Plan and Trust Agreement, Lehigh Valley Vascular Surgeons Ltd. Retirement Plan, Lehigh Valley Vascular Surgeons, Ltd., and Kenneth M. McDonald, Trustee in the amount of $42,966 for life insurance coverage under both Plans.

2. JUDGMENT IS ENTERED in favor of Plaintiff and against Defendants Kaupp Vascular Surgeons, Ltd. Defined Benefit Plan and Trust Agreement, Lehigh Valley Vascular Surgeons, Ltd., and Kenneth M. McDonald, Trustee in the amount of $62,072 for Plaintiff's lost benefits under the Defined Benefit Plan.

3. JUDGMENT IS ENTERED in favor of Plaintiff and against Defendants Lehigh Valley Vascular Surgeons, Ltd. Retirement Plan, Lehigh Valley Vascular Surgeons, Ltd., and Kenneth M. McDonald, Trustee in the amount of $180,037.99 for Plaintiff's benefits under the Defined Contribution Plan.

4. JUDGMENT IS ENTERED in favor of Plaintiff and against Defendant Lehigh Valley Vascular Surgeons, Ltd. and Kenneth M. McDonald, Trustee in the amount of $137,790 for Plaintiff's lost salary used to fund the Defined Benefit Plan.

5. JUDGMENT IS ENTERED in favor of Plaintiff and against Defendant Lehigh Valley Vascular Surgeons Ltd. in the amount of $191,300 for failure to provide information required by ERISA.

6. As set forth above, JUDGMENT IS ENTERED in favor of Plaintiff and against Defendants in the total amount of $614,165.99.

7. Plaintiff shall file an affidavit setting forth an itemized account of her claim for attorneys fees and expenses within two weeks of the date of the entry of this order by the Clerk. Defendants shall respond within one week of service.

IT IS SO ORDERED.

_____

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	NO. 88-1853
	:	
Defendants	:	

MEMORANDUM

HUYETT, J. November 23, 1992

Plaintiff Ruth Haberern is a sixty-nine year old woman who from 1974 to 1985 worked full-time as a secretary-bookkeeper for a professional corporation formerly known as Kaupp Vascular Surgeons, Ltd., and now known as Lehigh Valley Vascular Surgeons, Ltd. Defendants are the professional corporation, its defined benefit and defined contribution pension plans, and the trustee of those plans. Plaintiff commenced this action under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 alleging that Defendants breached their fiduciary duties under the statute. Plaintiff seeks to recover back salary and pension benefits that Defendants have alleg-

edly wrongfully withheld, as well as costs and attorney's fees. The nonjury trial will begin on November 23, 1992.

One of the issues in this case is whether Defendants violated ERISA § 410(a), 29 U.S.C. § 1110(a)[12] by requiring that Plaintiff sign a general release, which Plaintiff has refused to sign, as a condition of receiving her pension benefits.

Defendants have filed a motion in limine seeking to offer and introduce into evidence the testimony of Arthur Bachman, Esquire, a partner in the Philadelphia law firm of Blank, Rome, Comisky and McCalley, an expert in labor law, particularly pension plan administration and law. Defendants intend to have Mr. Bachman testify that it is his practice to recommend to his clients that they obtain releases from beneficiarieS when distributing pension benefits, that it is reasonable pension plan administrative practice to request these releases, and that these releases can be obtained from beneficiarieS relating to issues and claims beyond the scope of the language of 29 U.S.C. § 1110(a). Defendants seek to introduce this testimony to rebut what they characterize as plaintiff's assertions that Defendants' conduct was unreasonable, arbitrary, and capricious. Defendants contend that they should be permitted to demonstrate that they proceeded in a reasonable fashion, in accordance with the standard practice of a considerable number of other employers in requesting releases, and that they therefore did not act unreasonably, arbitrarily, or capriciously.

Plaintiff opposes Defendants' motion. First, plaintiff contends that Defendants have mischaracterized her allegations. Plaintiff claims that the entirety of Defendants' conduct was unreasonable, arbitrary, and capricious. One aspect of Defendants' conduct was its request that Plaintiff sign a release as a condition of receiving her pension benefits. Plaintiff claims that this request violates 29 U.S.C. § 1110(a). Plaintiff contends that the testimony of Defendants' expert will not be

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[12] "Except as provided in sections 1105(b)(1) and 1105(d) of this title, any provision in any agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy."

helpful to the trier of fact and the proposed testimony is an impermissible opinion on a legal issue.

District courts have broad discretion in determining whether to permit expert testimony. Mayhew v. Bell Steamship Co., 917 F.2d 961 (6th Cir. 1990). The Federal Rules of Evidence provide that

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Fed. R. Evid. 702. The evidence rules state that otherwise admissible testimony "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed. R. Evid. 704(a).

While the Federal Rules of Evidence permit helpful expert opinion that embraces an ultimate factual issue to be decided, they do not permit opinion on a question of law. 1 McCormick On Evidence, § 12, at 50 (John W. Strong ed., 4th ed. 1992). Courts have addressed the question of the admissibility of testimony given by an expert attorney. Generally, an attorney may not instruct the trier of fact as to the law. An attorney may testify, however, concerning the facts surrounding contract negotiations, for example, or the ordinary practices of those engaged in certain occupations or industries. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence § 702[02], at 702-33 (1992) (collecting cases). See also id. at 702-29 n.24 (collecting cases concerning when expert testimony allowed and not allowed).

Here, Defendants seek to have Mr. Bachman testify regarding his personal practice of advising employers to obtain releases when distributing pension monies and to testify that this practice conforms with standard pension plan administrative practice, and is therefore reasonable. Courts do allow testimony about the standard practices,

procedures, and customs of those engaged in an industry when helpful to the trier of fact to resolve factual issues. See, e.g., First National State Bank v. Reliance Electric Co., 668 F.2d 725, 731 (3d Cir. 1981) and Bauman v. Centex Corp., 611 F.2d 1115, 1121 (5th Cir. 1980), cited by Defendants, and Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 509 (2d Cir.), cert. denied, 434 U.S. 861 (1977). Here, however, whether Defendants acted reasonably in that they followed the standard practice of employers' in obtaining releases when distributing pension benefits is not the real issue. The real issue is whether this practice violates ERISA § 410, 29 U.S.C. § 1110(a). This is a legal issue for the court rather than an issue of fact for the trier of fact.

Furthermore, Mr. Bachman's proposed testimony that releases can be obtained from beneficiaries relating to issues and claims beyond the scope of 29 U.S.C. § 1110(a) is, in essence, a legal opinion that the release Defendants requested plaintiff to sign did not violate ERISA. This is an application of section 1110(a) to the facts of this case. An expert may not opine legal conclusions drawn by applying the law to the facts. A.E. v. Independent School Dist., 936 F.2d 472, 476 (10th Cir. 1991). Such testimony as to the requirements or scope of section 1110(a) is an impermissible delegation of the trial court's duty to determine questions of law. See Molecular Technology Corp. v. Valentine, 925 F.2d 910, 919 (6th Cir. 1991); Marx, 550 F.2d at 508-510.

Because the proposed expert testimony of Mr. Bachman will take the form of an opinion on a question of law, it will not "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Therefore, the proposed testimony is inadmissible. Both parties have submitted pretrial briefs and they will have ample opportunity to present their legal arguments to the Court following the trial. The Court cannot permit them to do so in the guise of expert testimony. Accordingly, the court will deny Defendants' motion in limine. An appropriate order follows.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	NO. 88-1853
	:	
Defendants	:	

ORDER

HUYETT, J. November 23, 1992

Upon consideration of Defendants' motion in limine, Defendants' memorandum of law, plaintiff's response, and for the reasons stated in the foregoing memorandum, Defendants' motion in limine to permit Arthur Bachman, Esquire to testify as an expert witness is DENIED.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN	:	CIVIL ACTION
	:	NO. 88-1853
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN, et al.	:	

MEMORANDUM AND ORDER

HUYETT, J. June 26, 1989

On February 28, 1988, plaintiff Ruth Haberern commenced this action under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, et seq., against her former employer, Lehigh Valley Vascular Surgeons, Ltd. ("Lehigh")[1]; Lehigh's defined benefit plan; Lehigh's defined contribution plan; and Kenneth M. McDonald, M.D., the trustee of both plans.

Haberern was employed by Lehigh as a secretary on a full-time basis from 1974 to January 1985, and thereafter on a part-time basis until December 1986. Lehigh's defined benefit and defined contribution plans were both, at all times relevant to this action. "Employee pension benefit plans" and "pension plans," as defined in 29 U.S.C. §1002(2), governed by ERISA. The Internal Revenue Service approved the termination of Lehigh's defined benefit plan in December, 1985. In July 1987 Haberern received from McDonald a check in the amount of $42,986.24, which was purportedly her share of the distribution of the defined benefit plan. Haberern has not yet received a distribution from the defined contribution plan.

[1] Before 1984, Lehigh was named Kaupp Vascular Surgeons, Ltd. References to "Lehigh" also refer to its earlier designation.

In her Second Amended Complaint[2], Haberern alleges that the defendants[3] have violated the plaintiff's rights under ERISA and the plans by: failing to distribute her share of the proceeds of the pension plans within the times prescribed in the plans' instruments, and by demanding the execution of releases in return for their payment of these sums (Count I); reducing her salary and forcing her to make contributions from her salary in order to fund the defined benefit plan (Count II); discriminatorily amending the defined benefit plan to provide an insurance benefit for all plan participants except her (Count III); failing to distribute her defined contribution plan benefit and instead liquidating her stock investments and placing the amounts in a money market account under McDonald's name as plan trustee (Count IV); failing to furnish required information, documents, accountings and reports concerning the plans (Count V); knowingly failing to allocate and distribute all the benefits due plaintiff under the plans (Count VI); and designating as a "bonus" a portion of plaintiff's salary for purposes of the defined benefit plan and reducing her benefits under that plan (Count VIII). Plaintiff also brings a state tort claim against defendants Lehigh and McDonald, alleging that they tortiously converted plaintiff's defined contribution plan benefit to their own use (Count VII).

As relief, plaintiff seeks, inter alia, an accounting for all monies received by the plans; a judgment for the amount found due to the plaintiff under the plans; compensatory damages, including "amounts that would have been earned on the investment of those benefits that were transferred by McDonald" to the money market accounts in his name; and punitive damages.

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[2] Defendants initially moved for partial summary judgment as to the plaintiff's First Amended Complaint. The Second Amended Complaint was filed ruing the pendency of the defendants' motion, and was followed by a second motion for partial summary judgment.

[3] Plaintiff brings count I against all defendants. Counts II and III against Lehigh and Counts IV through VIII against Lehigh and McDonald. For simplicity, I shall sometimes refer to these parties collectively as "defendants" in my discussion of a particular count.

Defendants now move to strike plaintiff's jury trial demand, arguing that the plaintiff seeks relief that is essentially equitable in nature. The defendants also move for partial summary judgment on Counts I through IV and VII through VIII and on plaintiff's claim for lost profits and punitive damages. I shall examine in turn the defendants' contentions.

Jury Trial

The defendants have moved to strike plaintiff's jury trial demand, asserting that the relief sought is primarily equitable in nature and thus the plaintiff has no right to a jury. The plaintiff contends that the Third Circuit in Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988), recognized that some claims under ERISA might be legal in nature and thus triable before a jury. In any event, plaintiff contends that she has a right to a jury trial on her Count VII conversion claim.

It is clear that no jury trial right exists in private actions brought under ERISA §502(a)(3) to enjoin practices which violate ERISA, to enforce ERISA or the terms of the plan, or to obtain other equitable relief. Cox, supra, 861 F.2d at 393-94; Turner v. CF&I Steel Corp., 770 F.2d 43, 46 (3d Cir. 1985), cert. denied, 475 U.S. 1058 (1986). In Turner, the Third Circuit aligned itself with most other Courts of Appeals that have considered the issue by holding that ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), does not require a jury trial in most actions by a beneficiary or participant claiming entitlement to additional benefits under a plan. This holding was predicated on the court's recognition that the remedies under this provision had their origin in the law of trusts, and that most (a)(1)(B) actions do not involve disputed issues of fact. I do not believe that the court in Cox intended to retreat from the essential holding of Turner. Rather, because the district court did not consider whether the plaintiff's claim was brought under (a)(1)(B) and, if so, whether the circumstances of his claim rendered it primarily legal in character, the Third Circuit remanded to allow the lower court the first opportunity to consider these issues. The Turner holding was reinforced in Pane v. RCA Corp., 868

F.2d 631 (3d Cir. 1989), in which the court held that there is generally no jury trial right for causes of action authorized under §1132(a).

In this case, the essential elements of the plaintiff's prayer for relief -- an accounting of her contributions to the pension plans, and the enforcement of her right under ERISA and the plans to the distribution of her share of the plans' proceeds -- are equitable in nature. Under Turner, Pane, and similar authority from other Circuits, see e.g., Katsaros v. Cody, 744 F. 270 (2d Cir. 1984), cert. denied, sub nom. Cody v. Donovan, 469 U.S. 1072 (1984); Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.s. 1112 (1981), I conclude that plaintiff is not entitled to a jury trial on her ERISA claims.[16]

Discrimination Claims

In Counts II, III, and VIII[17], the plaintiff claims that the defendants violated ERISA's anti-discrimination provisions, 29 U.S.C. §1140, by reducing her salary in 1980 and requiring her to make contributions to the defined benefit plan from her salary (Count II); discriminatorily amending the defined benefit plan to provide an insurance benefit for all plan participants except her (Count III); and designating as a "bonus" a portion of plaintiff's salary for purposes of the defined benefit plan, thereby reducing the employer's contributions and the plaintiff's benefits under that plan (Count VIII). The defendants assert that the plaintiff has failed to make out a §1140 discrimination claim under any of those counts.

In pertinent part, §1140 provides:

> It shall be unlawful for any person to... discriminate against a participant or a beneficiary... for the purpose

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[4] As noted infra, the plaintiff's state law conversion claim is preempted by ERISA.

[5] I shall discuss infra the plaintiff's claims in Counts II and VIII under 29 U.S.C. §1104(a) and the application of the statute of limitations to plaintiff's §1104(a)(1) claim under Count II.

of interfering with the attainment of any right to which such participant may become entitled under the plan...

As in Title VII actions, employees alleging discrimination under §1140 bear the burden of making out a prima facie case of discrimination. To do so, "an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." Gavalik v. Continental Can Co., 812 F.2d 834, 852 (3d Cir.), cert. denied, --- U.S. --- (1987). "[T]he essential element of proof under §510 is specific intent to engage in proscribed activity." Id. The primary objective of this provision is to protect an employment relationship that gives rise to an individual's rights under an employment benefit plan. Ahne v. Allis-Chalmers Corp., 640 F.Supp. 912, 919 (E.D. Wisc. 1986); West V. Butler, 621 F.2d 240, 245 (6th Cir. 1980). The legislative history of this provision "reveals that the prohibitions were aimed primarily at preventing unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." Gavalik, supra, 812 F.2d at 851, quoting West, 621 F.2d at 245. In order to violate §1140, the employer's actions "must affect the individual's employment relationship in some substantial way." West, at 245-46.

I agree with defendants that plaintiff has not satisfied her initial burden under Gavalik on her discrimination claims. Although discharge or overt employee discrimination may not be the sine qua non of a §1140 claim, the plaintiff must at a minimum present evidence to support an inference that the defendants acted with the discriminatory purpose of interfering with her rights under ERISA or the plans. In this case, the reduction in plaintiff's salary, and the designation of a portion of her salary as a "bonus" were consistent with the treatment of all other plan participants, including the physician plan participants. The payroll records furnished by defendants establish that the salaries of all plan participants were substantially reduced in 1980. Defendants' Reply Memo in Support of (First) Motion for Partial Summary Judgment at Exh. B. Further, all plan participants took a portion of their compensation as "bonus." Indeed, the bonuses paid to physician plan partici-

pants were a greater proportion of their total compensation than the bonuses paid to plaintiff.

The plaintiff argues that the treatment of the other participants is irrelevant to her §1140 claims, so long as she demonstrates that the reduction of her salary, or the payment of bonuses, may have interfered with her rights under the plans. I disagree. Although the plaintiff need not show that an adverse employment action was taken for the sole purpose of interfering with her pension rights, she must under §1140 demonstrate that the defendants had the "specific intent" to violate her rights under ERISA or the plans. Proof of incidental loss or reduction of benefits does not suffice to make out a claim under §1140. Gavalik, 812 F.2d at 851. To allow a plaintiff to proceed with a §1140 discrimination claim without any evidence that the plaintiff was, in fact, treated discriminatorily would be to ignore the clear objective of the statute, which is to prevent purposeful interference with employee pension rights. West, supra, 621 F.2d at 244. Thus, I shall grant summary judgment for defendants on plaintiff's §1140 claims under Counts II and VIII.

In Count III, the plaintiff claims that the defined benefit plan was discriminatorily amended to terminate her life insurance benefit. The plaintiff alleges that the plan was amended in October 1980 to increase the amount of life insurance, and to limit the benefit to plan participants who were 56 years or younger. Second Amended Complaint, ¶19. Because plaintiff was the only plan participant who was 56 or older at the time of the amendment, the effect of the amendment was to continue life insurance coverage to all plan participants except her. Id., at ¶21.

The defendants argue that the elimination of life insurance coverage does not constitute interference with the plaintiff's employment relationship within the meaning of §1140. See West, supra, at 245-46. However, diminishing an employee's participation in a plan may support a claim under §1140 if the action was taken for the purpose of interfering with the attainment of rights of the plan participants. Ahne, supra, 640 F.Supp. at 920. In this case, the defined benefit plan originally provided all plan participants with life insurance coverage.

Plaintiff's coverage was terminated by the 1980 amendment. Given hat the age-based limitation of the 1980 amendment had the effect of excluding only the plaintiff, I cannot conclude as a matter of law that the amendment was not discriminatory within the meaning of §1140. Although life insurance may not be an "accrued" benefit under ERISA, 29 U.S.C. §1002(23), the forfeiture of even such ancillary benefits may be actionable under ERISA if the forfeiture is not rational, or results in "prohibited discrimination or in a violation of a specific provision of ERISA." Petrella v. NL Industries, Inc., 529 F.Supp. 1357, 1366 (D.N.J. 1982). The amendment of the plan presents factual issues as to whether the action was taken with a discriminatory purpose. I shall therefore deny the defendant's motion as to Count III.

Statute of Limitations

Defendant asserts that Count II is timebarred, as the plaintiff knew or should have known of this cause of action when the salary reduction occurred in 1980. The plaintiff asserts that statute of limitations was tolled during the period when the defendants allegedly concealed the illegality of their conduct by (1) falsely advising her that she was required to fund her pension plan, and (2) omitting from the summary plan description provided to her the page which stated that it was the employer's exclusive obligation to fund the plan. Plaintiff asserts that it was only in 1987, when she saw a complete copy of the summary plan, that she was aware of her claim against the defendants.

At the outset, it must be determined which statute of limita-

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[6] In any event, the statute of limitations might not bar the plaintiff's Count II claim in toto. The plaintiff contends that her employer reduced her salary in 1980 in order to fund her defined benefit plan, in contravention of the requirement that the plan be funded solely through employer contributions. If the plaintiff establishes that the consequence of the 1980 salary reduction was that she was, in effect, forced to fund her defined benefit plan in succeeding years, then each reduced paycheck might constitute a separate breach of her rights under the plan for purposes of the statute of limitations. Meagher v. International Association of Machinists & Aerospace Workers Pension Plan, 856 F.2d 1418, 1423 (9th cir. 1988), cert. denied, 109 S.Ct. 1943 (1989).

tions applies to Count II. The plaintiff argues that her Count II claim is governed by Pennsylvania's six year residuary statute of limitations. See Gavalik, supra, 812 F.2d at 843 (state's residuary statute of limitations applies to §1140 claims). However, because the plaintiff has not made out her §1140 claim under Count II, I conclude that the count is governed by 29 U.S.C. §1113, the statute of limitations applicable to plaintiff's alternative Count II theory that the defendants' actions were in violation of their duties under §1104(a)(1). That statute bars claims that are commenced after the earlier of (a) six years after the date of the last action which constituted a part of the breach or violation," or (b) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.

As the plaintiff filed her complaint over six years after the 1980 reduction, this claim would ordinarily be time-barred. However, the statute of limitations is tolled for the period during which a defendant conceals from the plaintiff the existence of the claim. See Knuth v. Erie-Crawford Dairy Cooperative Association, 463 F.2d 470, 481-82 (3d Cir. 1972), cert. denied, 410 U.S. 913 (1973). Section 1113 specifically provides that in the case of fraud or concealment, the action must be commenced "not later than six years after the date of discovery of such breach or violations."

The defendants contend that the plaintiff, who was the bookkeeper for Lehigh during the relevant period, had access to information in 1980 that was sufficient to alert her to the basis of her Count II claim. However, construing the evidence in plaintiff's favor, as I must in the context of the present motion, I cannot conclude that there is no genuine material factual issue regarding the defendants' alleged fraudulent concealment of the Count II claim. Thus, I shall allow the plaintiff to proceed on her Count II theory under §1104(a)(1).[18]

Counts I, II, IV and VIII

The defendants assert that under Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 140 (1985), the plaintiff cannot recover under Counts I, II, IV, and VIII. In Massachusetts Mutual, the courted noted that 29 U.S.C. §1132(a)(2) authorizes a plan

beneficiary to bring an action under ERISA §409, 29 U.S.C. §1109, for breach of fiduciary duty. The court held, however, that the text of §409 established "that Congress did not intend that section to authorize any relief except for the plan itself." 473 U.S. at 144. Thus, "a recovery under §409 for a breach of fiduciary duty does not go to any individual plan participant or beneficiary, but inures to the benefit of the plan as a whole." McMahon v. McDowell, 794 F.2d 100, 109 (3d Cir.), cert. denied, 479 U.S. 971 (1986). In short, §409 does not authorize a private of action for compensatory relief. Id.

The defendants assert that Counts I, II, IV, and VIII allege breaches of fiduciary duty, and thus plaintiff is precluded from seeking a personal recovery. Plaintiff counters that these claims are properly brought under 29 U.S.C. §1132(a)(1)(B). That provision permits a plan participant to bring an action to recover benefits, or to enforce or clarify rights to benefits under the terms of a pension plan.

Plaintiff's point is well taken. As the court stated in McMahon, actions under §1132(a)(1)(B) "are personal in nature and seek to declare the plaintiff beneficiary's rights under the plan to recover benefits personally due him, or to enforce his personal rights." 794 F.2d at 109, quoting Livolsi v. R.A.M. Construction Co., 728 F.2d 600, 602 (3d Cir. 1984). The court in Massachusetts Mutual also recognized that §1132(a)(1)(B) allowed a pension plan participant "to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of a plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future." 493 U.S. at 147.

Here, although the counts at issue allege a violation of defendants' duties under §1104(a)(1), the gravamen of the plaintiff's claims under those counts is that defendants decreased the amount of the benefits due her under the plans, and violated her rights under ERISA and the terms of the plans, by failing to distribute in a timely manner; demanding the execution of legal releases; forcing her to make contributions from her salary in order to fund the defined benefit plan; failing to distribute her defined contribution plan benefit; and improperly des-

ignating as a "bonus" a portion of plaintiff's salary for purposes of the defined benefit plan. These counts center on the plaintiff's personal claims for accrued benefits and for the enforcement of her rights under the plan. I thus conclude that they are properly brought under §1132(a)(1)(B).[7]

Count VII

ERISA's pre-emption provision, 29 U.S.C. §1144(a), has been given broad effect by the Supreme Court, which has held that state law claims having a "connection with or reference to a [pension] plan" are preempted by ERISA's pervasive regulation of the field. Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 739 (1985). As the court later noted, the "carefully integrated civil enforcement provisions" of 29 U.S.C. §1132, and "ERISA's interlacing, interrelated, and interdependent remedial scheme," demonstrate that "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." Massachusetts Mutual v. Russell, supra, 473 U.S. at 146; see also Pilot Life Insurance Co. v. Dedeaux, 481 U.S. 41 (1987) (ERISA preempts state tort and contract claims relating to the improper processing of a disability claim); Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58 (1987)(ERISA preempts state contract and emotional distress claims).

Under this standard, I conclude that Count VII, the plaintiff's conversion claim, is preempted by ERISA. The conduct alleged in Count VII, McDonald's alleged deposit of checks related to plaintiff's defined contribution plan benefits into an account under this control, is the same conduct alleged under Count IV, which charges a violation of McDonald's and Lehigh's duty under §1104(a)(1). The gravamen of both claim is the allegation that McDonald violated the plaintiff's rights under the defined contribution plan, and his duties as plan trustee by taking funds related to plaintiff's plan benefits. Under the expansive preemption provision of ERISA, as interpreted in the above decisions,

[7] Defendants contend that there is no factual support for plaintiff's claims under Counts II and VIII. However, factual issues pertinent to both counts are raised by the reduction of the plaintiff's salary in 1980, and the employer's subsequent payment of a substantial portion of plaintiff's compensation as "bonus."

the basis of the conversion claim clearly "relates to" a pension plan. Thus, the plaintiff cannot proceed on her conversion claim. See Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208, 1214-16 (8th Cir. 1980), cert. denied, 454 U.S. 968 (1981); Board of Trustees of Cedar Rapids Pediatric Clinic v. Continental Assurance, 690 F.Supp. 792, 797 (W.D.Ark. 1988); District 65, UAW v. Harper & Row Publishers, Inc., 576 F.Supp. 1468, 1487 (S.D.N.Y. 1983).

Lost Profits and Punitive Damages Claims

Finally, the defendants move for the dismissal of the plaintiff's claims for damages related to lost profits and for punitive damages. I agree that the logic of the Supreme Court's decision in Massachusetts Mutual, precludes the plaintiff's claim for extra contractual damages. The court there held that the plaintiffs were not entitled under ERISA to extracontractual damages or punitive damages relating to a delay in paying disability benefits. As the court noted, the "carefully integrated civil enforcement provisions" of 29 U.S.C. §1132, and "ERISA's interlocking, interrelated, and interdependent remedial scheme," demonstrate that "Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146. Lower court decisions since Russell support the view that the extracontractual damages sought by plaintiff are not recoverable under ERISA. In Pane, supra, the Third Circuit stated that "[p]unitive damages are not available [under the plaintiff's ERISA count]. It has been consistently held that 29 U.S.C. §1132(a) does not authorize such relief." 868 F.2d at 635 n.2. See also Hancock v. Montgomery Ward Long Term Disability Trust, 787 F.2d 1302, 1306-07 (9th Cir. 1986); Agee v. Armour Foods Co., 672 F.Supp. 1210, 1220 (W.D.Mo. 1986), aff'd, 834 F.2d 144 (8th Cir. 1987).[8] I shall thus grant the defendants' motion as to the plaintiff's claim for punitive and lost profits damages.

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[8] Although some courts have held that punitive damages are available in ERISA actions alleging willful and wanton breach of fiduciary duty to pension beneficiaries, see e.g., Gilliken v. Hugh, 609 F.Supp. 178, 182 (D.Del. 1985); Miner v. International Typographical Union Negotiated Pension Plan, 601 F.Supp.

An appropriate order follows.

Daniel H. Huyett, 3rd, Judge

1390, 1393 (D.Colo. 1985); Kann v. Keystone Resources, Inc., 575 F.Supp. 1084, 1095 (W.D.Pa. 1983), the overwhelming weight of judicial authority holds that such damages are unavailable under ERISA. See, e.g., Varhola v. Doe, 802 F.2d 809 (6th Cir. 1987); Kleinhans v. Lisle Savings Profit Sharing Trust, 810 F.2d 618 (7th Cir. 1987); Powell v. Chesapeake & Potomac Telephone Company of Virginia, 780 F.2d 419 (4th Cir. 1985), cert. denied, 476 U.S. 1170 (1986). As the Supreme Court observed in Russell, supra, provisions for punitive damages are notably absent in the comprehensive private civil enforcement remedies specified in ERISA. 473 U.S. at 144. The plaintiff notes that the House Education and Labor Committee stated last year that it intended the federal courts to develop a federal common law of ERISA remedies, "including... the imposition of punitive damages on the person responsible for the failure to pay claims in a timely manner." H.R. Rep. No. 801 (Part 2), 100th Cong. 2d Sess. (1988). I recognize the importance of this statement from the relevant House Committee in interpreting the legislative intent behind private ERISA remedies. However, in my view of the emphatic and longstanding judicial precedent on ERISA punitive damages, I believe that more formal and definitive legislative action is required before I may assume that Congress intended to make punitive damages available to private litigants under ERISA.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	
	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN, et al.	:	NO. 88-1853

ORDER

HUYETT, J. JUNE 26, 1989

Upon consideration of the Defendants' Motion for Partial Summary Judgment and to Strike Jury Trial Demand, the plaintiff's response thereto, and the parties' memoranda, and for the reasons stated in the accompanying memorandum of law, it is ORDERED that the motion is GRANTED IN PART AND DENIED IN PART as follows:

1. The defendants' motion to strike the plaintiff's jury trial demand is GRANTED.

2. The defendants' motion for summary judgment is GRANTED as to Count VII, and as to the plaintiff's 29 U.S.C. §1140 claims under Counts II and VIII.

3. The defendants' motion for summary judgment on the plaintiff's claims for punitive damages related to lost profits is GRANTED.

4. The defendants' motion for summary judgment on the plaintiff's remaining claims is DENIED.

IT IS SO ORDERED.

Daniel H. Huyett, 3rd, Judge

UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT
No. 93-1892

RUTH HABERERN

v.

KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PENSION PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; KENNETH M. MCDONALD, M.D., TRUSTEE

June 20, 1994, Decided

On Appeal from the United States District Court for the Eastern District of Pennsylvania. D.C. Civil No. 88-01853

Before: Sloviter, Chief Judge, and Becker, Stapleton, Mansmann, Greenberg, Hutchinson, Scirica, Cowen, Nygaard, Alito, Roth, and Lewis, Circuit Judges

The petition for rehearing filed by the appellee, Ruth Haberern, in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing by the court in banc, the petition for rehearing is denied.

By the Court:

Morton I. Greenberg, Circuit Judge

Dated: June 20, 1994

29 U.S.C. §1001. Congressional findings and declaration of policy

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. §1002. Definitions

For purposes of this subchapter:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940 [15 U.S.C. 80a-1 et seq.], such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter

to be deemed to be a fiduciary or a party in interest as those terms are defined in this subchapter, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

29 U.S.C. §1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024(a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) of this section shall be filed in accordance with section 024(a)(1)(D) of this title.

(b) The plan description and summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles, and addresses of any trustee or trustees (if they are persons different from the adminis-

trator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for non-forfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 1133 of this title).

29 U.S.C. §1104 Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulations, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

(d) Plan terminations

(1) If, in connection with the termination of a pension plan which is a single-employer plan, there is an election to establish or maintain a qualified replacement plan, or to increase benefits, as provided under section 4980(d) of title 26, a fiduciary shall discharge the fiduciary's duties under this subchapter and subchapter III of this chapter in accordance with the following requirements:

(A) In the case of a fiduciary of the terminated plan, any requirement --

(i) under section 4980(d)(2)(B) of title 26 with respect to the transfer of assets from the terminated plan to a qualified replacement plan, and

(ii) under section 4980(d)(2)(B)(ii) or 4980(d)(3) of title 26 with respect to any increase in benefits under the terminated plan.

(B) In the case of a fiduciary of a qualified replacement plan, any requirement --

(i) under section 4980(d)(2)(A) of title 26 with respect to participation in the qualified replacement plan of active participants in the terminated plan,

(ii) under section 4980(d)(2)(B) of title 26 with respect to the receipt of assets from the terminated plan, and

(iii) under section 4980(d)(2)(C) of title 26 with respect to the allocation of assets to participants of the qualified replacement plan.

(2) For purposes of this subsection

(A) any term used in this subsection which is also used in section 4980(d) of title 26 shall have the same meaning as when used in such section, and

(B) any reference in this subsection to title 26 shall be a reference to title 26 as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990.

29 U.S.C. §1105 Liability for breach of co-fiduciary

(a) Circumstances giving rise to liability

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b) **Assets held by two or more trustees**

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees --

(A) each shall use reasonable care to prevent a cotrustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3) (A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that --

(A) the named fiduciary violated section 1104(a)(1) of this title --

(i) with respect to such allocation or designation,

(ii) wit respect to the establishment or implementation of the procedure under this paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

(d) Investment managers

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustees shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

29 U.S.C. §1132 Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought --

(1) by a participant or beneficiary --

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation of (ii) to enforce such subsection.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a)[1] of title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if --

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form

(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters rea-

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[1] See References in Text note below.

sonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation. The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of title 42.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpoena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the

employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan --

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of --

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of title 26.

(h) Service upon Secretary of Labor and Secretary of the Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action

under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(l) Civil penalties on violations by fiduciaries

(1) In the case of --

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) --

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that --

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

29 U.S.C. §1140 Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. §1144 Other laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 U.S.C. §158 Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer --

(3) by discrimination in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage membership in any labor organization: Provided, that nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership thereon on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining until covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: provided, further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and initia-

tion fees uniformly required as a condition of acquiring or retaining membership.

29 C.F.R.,§2509.75-8 Questions and answers relating to fiduciary responsibility under the Employee Retirement Income Security Act of 1974

The Department of Labor today issued questions and answers relating to certain aspects of fiduciary responsibility under the Act, thereby supplementing ERISA IB 75-5 (29 CFR 2555.75-5) which was issued on June 24, 1975, and published in the Federal Register on July 28, 1975 (40 FR 31598).

Pending the issuance of regulations or other guidelines, persons may rely on the answers to these questions in order to resolve the issues that are specifically considered. No inferences should be drawn regarding issues not raised which may be suggested by a particular question and answer or as to why certain questions, and not others, are included. Furthermore, in applying the questions and answers, the effect of subsequent legislation, regulations, court decisions, and interpretive bulletins must be considered. To the extent that plans utilize or rely on these answers and the requirements of regulations subsequently adopted vary from the answers relied on, such plans may have to be amended.

An index of the questions and answers, relating them to the appropriate sections of the Act, is also provided.

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Key to question prefixes: D -- refers to definitions; FR - refers to fiduciary responsibility.

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NOTE: Questions D-2, D-3, D-4, and D-5 relate to not only section 3(21)(A) of Title I of the Act, but also section 4975(e)(3) of the Internal Revenue Code (section 2003 of the Act). The Internal Revenue Service has indicated its concurrence with the answers to these questions.

D-2 Q: Are persons who have no power to make any decisions as to plan policy, interpretations, practices or procedures, but who perform the following administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, fiduciaries with respect to the plan:

(1) Application of rules determining eligibility for participation or benefits;

(2) Calculation of services and compensation credits for benefits;

(3) Preparation of employee communications material;

(4) Maintenance of participants' service and employment records;

(5) Preparation of reports required by government agencies;

(6) Calculation of benefits;

(7) Orientation of new participants and advising participants of their rights and options under the plan;

(8) Collection of contributions and application of contributions as provided in the plan;

D

(9) Preparation of reports concerning participants' benefits;

(10) Processing of claims; and

(11) Making recommendations to others for decisions with respect to plan administration?

A: No. Only persons who perform one or more of the functions described in section 3(21)(A) of the Act with respect to an employee benefit plan are fiduciaries. Therefore, a person who performs purely ministerial functions such as the types described above for an employee benefit plan within a framework of policies, interpretations, rules, practices and procedures made by other persons is not a fiduciary because such person does not have discretionary authority or discretionary control respecting management of the plan, does not exercise any authority or control respecting management or disposition of the assets of the plan, and does not render investment advice with respect to any money or other property of the plan and has no authority or responsibility to do so.

However, although such a person may not be a plan fiduciary, he may be subject to the bonding requirements contained in section 412 of the Act if he handles funds or other property of the plan within the meaning of applicable regulations.

The Internal Revenue Service notes that such persons would not be considered plan fiduciaries within the meaning of section 4975(e)(3) of the Internal Revenue Code of 1954.

D-3 Q: Does a person automatically become a fiduciary with respect to a plan by reason of holding certain positions in the administration of such plan?

A: Some offices or positions of an employee benefit plan by their very nature require persons who hold them to perform one or more of the functions described in section 3(21)(A) of the Act. For example, a plan administrator or a trustee of a plan must, be the very nature of his position, have "discretionary authority or discretionary responsibility in the administration" of the plan within the meaning of

section 3(21)(A)(iii) of the Act. Persons who hold such positions will therefore be fiduciaries.

Other offices and positions should be examined to determine whether they involve the performance of any of the functions described in section 3(21)(A) of the Act. For example, a plan might designate as a "benefit supervisor" a plan employee whose sole function is to calculate the amount of benefits to which each plan participant is entitled in accordance with a mathematical formula contained in the written instrument pursuant to which the plan is maintained. The benefit supervisor, after calculating the benefits, would then inform the plan administrator of the results of his calculations, and the plan administration would authorize the payment of benefits to a particular plan participant. The benefit supervisor does not perform any of the functions described in section 3(21)(A) of the Act and is not, therefore, a plan fiduciary. However, the plan might designate as a "benefit supervisor" a plan employee who has the final authority to authorize or disallow benefit payments in cases where a dispute exists as to the interpretation of plan provisions relating to eligibility for benefits. Under these circumstances, the benefit supervisor would be a fiduciary within the meaning of section 3(21)(A) of the Act.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

D-4 Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?

A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan. However, their responsibility, and, consequently, their liability, is limited to the selection and retention of fiduciaries (apart from co-fiduciary liability arising under circumstances described in section 405(a) of the Act). In addi-

tion, if the directors are made named fiduciaries of the plan, their liability may be limited pursuant to a procedure provided for in the plan instrument for the allocation of fiduciary responsibilities among named fiduciaries or for the designation of persons other than named fiduciaries of persons other than named fiduciaries to carry out fiduciary responsibilities, as provided in section 405(c)(2).

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

D-5 Q: Is an officer or employee of an employer or employee organization which sponsors an employee benefit plan a fiduciary with respect to the plan solely by reason of holding such office or employment if he or she performs none of the functions described in section 3(21)(A) of the Act?

A: No, for the reasons stated in response to question D-2.

The Internal Revenue Service notes that it would reach the same answer to this question under section 4975(e)(3) of the Internal Revenue Code of 1954.

FR-11 Q: In discharging fiduciary responsibilities, may a fiduciary with respect to a plan rely on information, data, statistics or analyses provided by other persons who perform purely ministerial functions for such plan, such as those persons described in D-2 above?

A: A plan fiduciary may rely on information, data, statistics or analyses furnished by persons performing ministerial functions for the plan, provided that he has exercised prudence in the selection and retention of such persons. The plan fiduciary will be deemed to have acted prudently in such selection and retention if, in the exercise of ordinary care in such situation, he has no reason to doubt the competence, integrity or responsibility of such persons.

FR-12 Q: How many fiduciaries must an employee benefit plan have?

A: There is no required number of fiduciaries that a plan must have. Each plan must, of course, have at least one named fiduciary who serves as plan administrator and, if plan assets are held in trust, the plan must have at least one trustee. If these requirements are met, there is not limit on the number of fiduciaries a plan may have. A plan may have as few or as many fiduciaries as are necessary for its opera-

tion and administration. Under section 402(c)(1) of the Act, if the plan so provides, any person or group of persons may serve in more than one fiduciary capacity, including serving both as trustee and administrator. Conversely, fiduciary responsibilities not involving management and control of plan assets may, under section 405(c)(1) of the Act, be allocated among named fiduciaries and named fiduciaries may designate persons other than named fiduciaries to carry out such fiduciary responsibilities, if the plan instrument expressly provides procedures for such allocation or designation.

FR-13 Q: If the named fiduciaries of an employee benefit plan allocate their fiduciary responsibilities among themselves in accordance with a procedures set forth in the plan for the allocation of responsibilities for operation and administration of the plan, to what extent will a named fiduciary be relieved of liability for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities allocated to them?

A: If named fiduciaries of a plan allocate responsibilities in accordance with a procedure for such allocation set forth in the plan, a named fiduciary will not be liable for acts and omissions of other named fiduciaries in carrying out fiduciary responsibilities which have been allocated to them, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary responsibility, and section 405(c)(2)(A) of the Act, relating in relevant part to standards for establishment and implementation of allocation procedures.

However, if the instrument under which the plan is maintained does not provide for a procedure for the allocation of fiduciary responsibilities among named fiduciaries, any allocation which the named fiduciaries may make among themselves will be ineffective to relieve a named fiduciary from responsibility or liability for the performance of fiduciary responsibilities allocated to other named fiduciaries.

FR-14 Q: If the named fiduciaries of an employee benefit plan designate a person who is not a named fiduciary to carry out fiduciary responsibilities, to what extent will the named fiduciaries be relieved of liability for the acts and omissions of such person in the performance of his duties?

A: If the instrument under which the plan is maintained pro-

vides for a procedure under which a named fiduciary may designate persons who are not named fiduciaries to carry out fiduciary responsibilities, named fiduciaries of the plan will not be liable for acts and omissions of a person who is not a named fiduciary in carrying out the fiduciary responsibilities which such person has been designated to carry out, except as provided in section 405(a) of the Act, relating to the general rules of co-fiduciary liability, and section section 405(c)(2)(A) of the Act, relating in relevant part to the designation of persons to carry out fiduciary responsibilities.

However, if the instrument under which the plan is maintained does not provide for a procedure for the designation of persons who are not named fiduciaries to carry fiduciary responsibilities, then any such designation which the named fiduciaries may make will not relieve the named fiduciaries from responsibility or liability for the acts and omissions of the persons so designated.

FR-15 Q: May a named fiduciary delegate responsibility for management and control of plan assets to anyone other than a person who is an investment manager as defined in section 3(38) of the Act so as to be relieved of liability for the acts and omissions of the person to whom such responsibility is delegated?

A: No. Section 405(c)(1) does not allow named fiduciaries to delegate to others authority or discretion to manage or control plan assets. However, under the terms of sections 403(a)(2) and 402(c)(3) of the Act, such authority and discretion may be delegated to persons who are investment managers as defined in section 3(38) of the Act. Further, under section 402(c)(2) of the Act, if the plan so provides, a named fiduciary may employ other persons to render advice to the named fiduciary to assist the named fiduciary in carrying out his investment responsibilities under the plan.

FR-16 Q: Is a fiduciary who is not a named fiduciary with respect to an employee benefit plan personally liable for all phases of the management and administration of the plan?

A: A fiduciary with respect to the plan who is not a named fiduciary is a fiduciary only to the extent that he or she performs one or more of the functions described in section 3(21)(A) of the Act. The personal liability of a fiduciary who is not a named fiduciary is generally limited to the fiduciary functions, which he or she performs with respect to the plan. With respect to the extent of liability of a named

fiduciary of a plan where duties are properly allocated among named fiduciaries or where named fiduciaries properly designate other persons to carry out certain fiduciary duties, see question FR-13 and FR-14.

In addition, any fiduciary may become liable for breaches of fiduciary responsibility committed by another fiduciary of the same plan under circumstances giving rise to co-fiduciary liability, as provided in section 405(a) of the Act.

FR-17 Q: What are the ongoing responsibilities of a fiduciary who has appointed trustees or other fiduciaries with respect to these appointments?

A: At reasonable intervals the performance of trustees and other fiduciaries should be reviewed by the appointing fiduciary in such manner as may be reasonably expected to ensure that their performance has been in compliance with the terms of the plan and statutory standards, and satisfies the needs of the plan. No single procedure will be appropriate in all cases; the procedure adopted may vary in accordance with the nature of the plan and other facts and circumstances relevant to the choice of the procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUTH HABERERN,	:	CIVIL ACTION
	:	NO. 88-1853
v.	:	
	:	
KAUPP VASCULAR SURGEONS LTD. DEFINED BENEFIT PLAN AND TRUST AGREEMENT; LEHIGH VALLEY VASCULAR SURGEONS LTD. RETIREMENT PLAN; LEHIGH VALLEY VASCULAR SURGEONS LTD.; and KENNETH M. McDONALD, TRUSTEE	:	Reading, Pennsylvania November 23, 1992 11:10 o'clock a.m.

CIVIL NON JURY TRIAL
BEFORE THE HONORABLE DANIEL H. HUYETT, 3rd
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

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Audio Operator: Beverly Salinger

Transcribed by: Denise Summers

(Proceedings recorded by Electronic Sound Recording; transcript produced by computer-aided transcription service.)

Q. I would like you now, in front of you are three books. They're quite heavy. Could you find the one that has Plaintiff's Exhibit 90 in it and open to that exhibit, please?

A. I think I have it.

Q. Does it appear to be a number of W-2s?

A. Yet, it does.

Q. Then you do have it, I believe. Now, can you tell me on page one of that exhibit is what appears to be a W-2, is that correct?

A. That's a W-2.

Q. And that's for the year 1973?

A. Yes, from C.H. Trexler Surgical Group.

Q. And that's your prior employer, is that correct?

A. Yes, sir.

Q. And you were paid what, that year?

A. $8,049.84, it looks like.

Q. Okay, now, will you turn to page 2?

A. Uh-huh, yes.

Q. Now, I see two W-2s there for 1974, can you explain that to the Court?

A. Well, the first, yes, the first page would have been from doctor -- what had happened, the doctor, as I've said, Dr. Trexler expired and it no longer was the C.H. Trexler Surgical Group. It, they, Dr. Stahler hired another physician by the name of Dr. George Hartzell and they formed their own corporation and Dr. Kaupp went into his own corporation which was vascular surgery. Stahler, Dr. Stahler and Hartzell were in general surgery.

Q. And what does the lower of these two W-2s reflect, your salary with them?

A. With the Stahler, Hartzell Surgical Group, yes, sir.

Q. And then you switched employers?

A. Yes, I did.

Q. And when did you switch?

A. July, it should have been July 1, 1974.

Q. Okay, and so in the first half of 1974, you earned what?

A. First, first half, I earned $4,132.56.

Q. And then when you went to work for Dr. Kaupp?

A. $6,000.04.

Q. $6,000.04?

A. Yes, sir.

Q. So that's a total of a little over $10,000 for that year?

A. Uh-huh, yes.

Q. Now, turn the next page. What is top document on page three of this group exhibit?

A. All right, that's a wage and tax statement for 1975 from Kaupp Vascular Surgeons for myself.

Q. And your salary increased that year to what number?

A. My total wages were $12,775.

Q. And then in 1976 did your wages also increase?

A. Yes, sir.

Q. To what number?

A. 19, it looks like $19,874.96.

Q. I think it's $13,000.

A. Is it 13, it's a little difficult, okay, $13,874.96.

Q. Okay and how about in 1977, did your salary increase in that year?

A. Yes.

Q. To what number?

A. $15,016, and it looks like 25 cents.

Q. It's a little hard to read --

A. Yes.

Q. But it was $15,000?

A. Yes.

Q. Okay, and how about in 1978, did your salary increase in that year?

A. '78, my total was $16,749.40.

Q. Okay, and then in 1979?

A. Okay, 19, 37 I guess, 4.48. It's a little hard to read.

Q. $19,376.48, is that correct?

A. Yes, sir.

A. I had no choice. When I was told about it, I was just told that, this happened in August, because that would have been the month that I would have made my percentage part of my salary check out. And prior to doing it, I was told in August of '80 that were were, we are going to divert. You will no longer receive your accounts receivable salary, percentage salary, we are going to divert it to pay the DB fund.

Q. Did you protest?

A. Did I protest? I sure did. I didn't want it. First of all, I needed the money. I had this boy. My husband wasn't working, or couldn't work and a boy, a young man who was going to go to medical school so I needed the money and also my age, I didn't plan to work forever and I was up at the point where I was going to be reaching 60 shortly, in a few years, and I wanted to retire too.

Q. Did anybody at that time tell you that the contributions to the DB plan were supposed to be paid by the employer?

A. No, no, nobody told me that.

Q. Who were you told were supposed to make the contributions?

A. They just told me that I had to, I had no choice.

Q. Now, at anytime between 1979 and the initiation of the DB plan and the date you retired, were you ever told that participation in the DB plan was voluntary?

A. Not at all.

Q. Between the time of the initiation of the DB plan and 1985 when you retired, were you ever told that the plan required the employer to make the payments for the DB plan?

A. No, I was not.

Q. At that point in time you, knew that going forward from 1979 or 1980, whenever that discussion was, that your compensation arrangement with the corporation was changing?

A. Yes, I did.

Q. All right. And you continued to work there?

A. Oh, absolutely because I was told that, excuse me, I was told that they were going to fund the defined benefit plan, as I said so many times and that when I retired, I would get a pension equal to my salary. That is the one and only reason I stayed. I wouldn't take a big percentage loss and continue to work for them.

Q. And how did that plan work?

A. Basically, the corporation made a contribution for all employees that were eligible. There was a formula. That formula then was 20 and a half percent for the first $10,800, I believe and then 27 and a half percent of salary on the excess of 10,800.

Q. Did there come a time when there were some discussions about establishing a defined benefit plan?

A. Yes, there were.

Q. Did you participate in those discussions?

A. Yes, I did.

Q. Can you please describe to the Court how those discussions came about?

A. Okay, Dr. Kaupp had been in practice for about four or five years and in 1979, I believe, the tax rates in effect at that time were 50 percent of earned income with up to 70 percent of unearned income being taxed on an individual level. Dr. Kaupp indicated that he was not in favor of paying as many taxes as he was now doing and he asked me if there were any suggestions to reduce his taxes. We reviewed various alternatives but with the help of PACS, an idea was, was acquired to form a defined benefit plan.

Q. Was there any discussion about Ruth Haberern or how this would effect Ruth Haberern? Whether they needed her in the plan?

A. Well, we, we saw the numbers and everyone was content that this was proper and we were doing things that were okay, but when we, when we saw what the contribution by the corporation for Ruth Haberern would be, it was felt that it was too much. Her salary --

Q. This is the employers contribution?

A. The employers contribution was too much. At the time --

Q. Did the plan provide for the employer to make the contribution?

A. Yes, it did. Ruth Haberern's salary at that time was approximately $19,000. Because she was older and because she had a short time to get to retirement, the defined benefit contribution would have been approximately $10,000 for her into the defined benefit plan in addition to her defined contribution plan.

Q. What was the doctor's reaction to the $10,000 contribution?

A. It was too much.

Q. What did they do --

A. For the corporation to pay for them.

Q. That would have been 10,000 on top of the 18,000 they were already paying her, correct?

A. That is correct.

Q. So, what did they do about it?

A. They decided to reduce her salary or to redefine her salary simi

larly to what they had done and they suggested, PACS suggested using a 14,400 and some odd dollar salary and to figure the defined benefit contribution on that figure rather than her 19.

Q. Why didn't they just exclude Ruth Haberern from the plan altogether?

A. The problem of doing that is --

MR. FOGERTY: I'm going to enter an objection. I mean, I don't want this witness's philosophy. If he's going to tell us what somebody said, that's acceptable.

BY MR. FOX:

Q. Why didn't the doctors exclude Ruth Haberern from the plan?

A. According to the IRS they couldn't.

Q. And why was that?

A. There's, there's a statute in the code which says that in order for a plan to be qualified which is what we had to do, you must include 70 percent of all employees or 80 percent of the eligible employees. Since there were only three employees, if Ruth was not in the plan, we would have only ha[illegible]6 and two thirds percent of the eligible and the total

MR. FOGERTY: Your Honor, if I may, the plan says what it says. I mean, now we're getting into argument as to what the requires. I mean the document's in evidence.

THE COURT: I really don't see the relevance or point of this, Mr. Fox. I will sustain the objection.

MR. FOX: Okay.

BY MR. FOX:

Q. In the discussions you had then, tell us again what the, or explain exactly what the arrangement was for Ruth Haberern under the DB plan as revised by the doctors to avoid paying the $10,000 that you described before?

A. They told her they were going to reduce her compensation, her salary from the 19,000 down to the 14,000 and then the amount going to the defined benefit plan for her would have been reduced from approximately 10,000 to approximately $5,500. In essence, she was taking her salary and funding her plan.

Q. Now, you said earlier that the DB plan was not voluntary because the employer paid?

A. That's correct.

Q. What do you mean the employer paid?

A. Well, the employer paid the cost of the plan, in other words, it didn't cost the employee didn't have to contribute to the plan.

Q. The employee did not have to contribute to the plan?

A. That's correct.

Q. That was provision of the plan?

A. That is correct.

Q. And so there, it was all money coming from the employer?

A. Yes.

Q. And therefore no employee in her right mind would turn down such a benefit, is that correct?

A. That's correct.

Q. And if an employee were forced to pay for the DB plan contribution, that would be a violation of the plan, is that not correct?

A. Yes, it wasn't provided for in the plan, that's correct.

Q. And similarly, at this particular place of employment the DC plan was fully paid by the employer, correct?

A. Yes.

Q. So this was a plan that did not require every employee to participate?

A. Well, it required the employees an application giving the beneficiary designation et cetera, and if they didn't do that, the trustees could deny them participation till they did it. That's all that says.

Q. So, if an employee didn't want to participate, the way to do that would be to not fill out a beneficiary designation?

A. Yeah, and decline it, that's correct.

Q. And that wouldn't violate the plan, because the plan anticipated that?

A. That is right.

A. From its inception, which must have been about, I would have to say, 1973 or four, until November 1st of '84.

Q. Can you tell me during that period, 1973 through November 1, 1984, were there any other shareholders of Kaupp Vascular Surgeons?

A. Yes.

Q. And who were they?

A. Dr. Ken McDonald.